proposals for a new competition policy for Canada

second stage

Combines Investigation Act Amendments
March, 1977

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

ERRATA SHEET

PROPOSALS FOR A NEW COMPETITION POLICY FOR CANADA - SECOND STAGE

APPENDIX

Pg.193 , After line 3 , insert

(5) No order shall be made under this section against any person on the sole basis of policies or conduct that has or is likely to have an effect described in paragraph (1) (a) or (b) where the Board is satisfied by such person that the policies or conduct of such person solely reflects superior efficiency or superior economic performance.

Pg. 189 , Line 20 , delete - "by deliberately"

Pg. 191 , Line 22 , delete - "by deliberately"

Pg. 205 , Line 13 , marginal note, at the beginning add, "International"

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Consumer and Corporate Affairs Canada
Consommation et Corporations Canada
The Hon. Anthony C. Abbott, Minister

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PROPOSALS FOR A NEW COMPETITION POLICY FOR CANADA

SECOND STAGE

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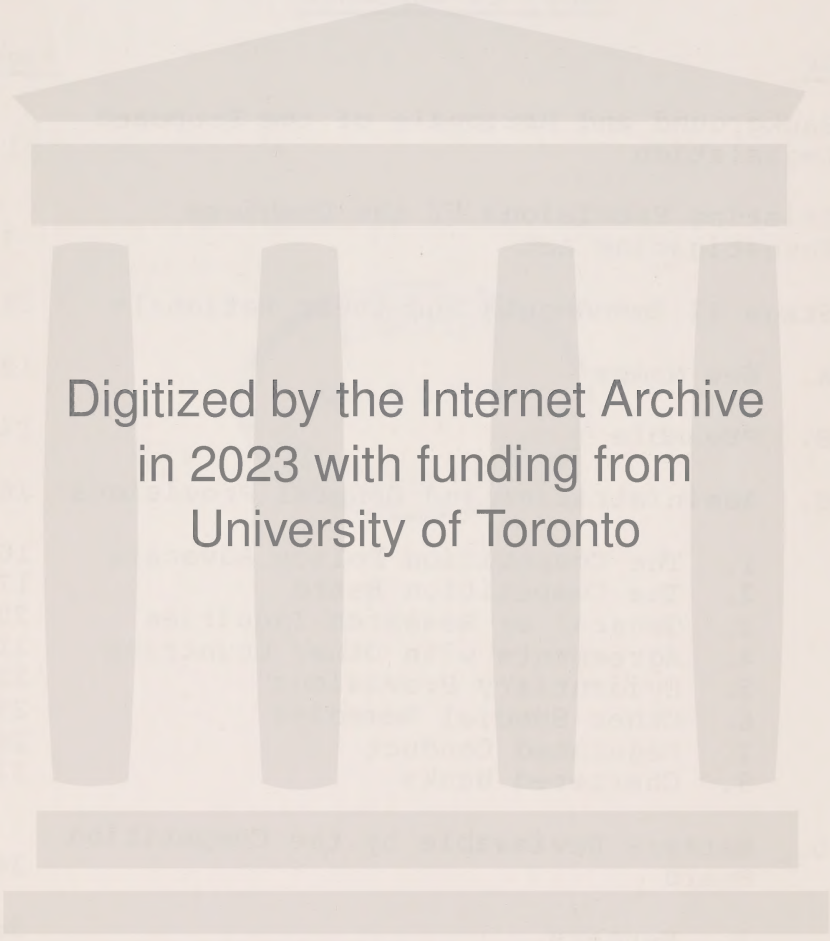

CHAPTER I

Background and Rationale of the Proposed Legislation

The Combines Investigation Act is designed to assist in stimulating and maintaining a viable competitive framework within a mixed economic system of private and public enterprise and to promote honesty and fair dealing in the marketplace. The Act has undergone periodic revisions to take account of enforcement experience and new conditions. The present review of competition policy, which is the most fundamental one ever undertaken in Canada, was launched in 1966 when the Government of the day commissioned a study of the subject by the Economic Council of Canada.

The first phase of the revised competition policy was adopted in October, 1975 when Parliament passed Bill C-2, almost two years after an identical Bill was introduced in the twenty-ninth Parliament. It was proclaimed in force effective January 1, 1976 in respect of most of its provisions, but, as agreed in advance, its ban on restrictive agreements concerning services was postponed for six months. Work on Stage II of the program began immediately after introduction of the Stage I Bill in 1975 in an effort to expedite this urgently needed legislation which had met many delays over a period of more than ten years.

A number of very serious inadequacies in the legislation had come to light well before the reference to the Economic Council in 1966. For

example, the Beer* and Sugar** cases of 1960 had shown that the legislation as applied to mergers was quite inadequate. The inapplicability of the present law even to extreme cases of concentration through mergers was recently underlined by the judgment of the Supreme Court of Canada in Regina v. K.C. Irving Ltd. et al in November, 1976. A report in 1962 of an extensive inquiry under the Combines Investigation Act into the distribution and sale of gasoline service station products*** revealed the presence of highly restrictive practices imposed by suppliers which could not be corrected under the legislation of the day. The growing internationalization of business was a complicating factor which brought with it the need for legislative changes to deal with restrictive business practices emanating from abroad. In formal recognition of the many problems associated with the application of Canada's existing competition policy, the Government in 1966, requested the Economic Council of Canada to study the issues involved therein and to recommend appropriate corrective reforms.

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* Regina v. Canadian Breweries Ltd. 1960 O.R. 601; 33 C.R. 1; 126 C.C.C. 133.

** Regina v. The British Columbia Sugar Refining Company Limited et al. (1960) 32 W.W.R. (N.S.) 577; 129 C.C.C. 7; (1962) 38 C.P.R. 177.

*** Restrictive Trade Practices Commission, Report on an Inquiry into the Distribution and Sale of Automotive Oils, Greases, Anti-Freeze, Additives, Tires, Batteries, Accessories and Related Products, (R.T.P.C. No. 18), Ottawa, 1962.

The Economic Council's study of competition policy was presented to the Government in July, 1969. It called for comprehensive revisions which would, among other important changes, place greater reliance on civil rather than criminal procedures in dealing with complex economic issues. The Minister of Consumer and Corporate Affairs at the time, the Honourable Ron Basford, immediately undertook extensive preparation for the production of a comprehensive Bill. The resulting draft legislation, introduced in June, 1971 as C-256, was regarded by the Minister more as a White Paper than a Bill, and on introduction he expressed the wish that it would provoke wide public debate. In this manner he hoped to bring about refinements based upon the input of the private sector. Certain aspects of the proposed legislation were not well received by some elements of the public and the legislation died on the order paper at the end of the session. Nonetheless, public discussion continued unabated. Seminars with representatives of the business, academic and legal fraternities were conducted and the work of drafting continued during the remainder of Mr. Basford's tenure. This work was continued during the relatively brief tenure of the Honourable Robert K. Andras just before the election of 1972. The election was followed by the creation in January 1973 of a Special Committee of the House of Commons on Trends in Food Prices. This committee recommended immediate implementation of a number of consumer protection measures by amendment of the Combines Investigation Act.

At the same time, the Minister, the Honourable Herb Gray, reviewed the progress of the work on the development of the new competition policy legislation and decided that it should proceed in two stages. The first stage would implement those aspects of Mr. Basford's Bill upon which consensus appeared to have been reached, such as the extension of the law to cover service industries, the introduction of the consumer protection measures

recommended by the Commons Committee, and the beginnings of a civil approach to certain trade practices by making the Restrictive Trade Practices Commission a Court of Record with carefully defined powers to issue orders in specified circumstances. The resulting legislation was introduced in November, 1973, but a general election was called before it could be enacted. After the general election in July, 1974, the Honourable André Ouellet became the new Minister and piloted the Bill originally introduced by Mr. Gray through Parliament. While over fifty amendments, some of which were important, were inserted during passage, the basic objectives were achieved.

In connection with Stage II, several studies* were commissioned by the Department and the Minister appointed an independent Advisory

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* M.J. Trebilcock, Anthony Duggan, Linda Robinson, Herman Wilton-Siegel and Claude Masse, A Study on Consumer Misleading and Unfair Trade Practices (2 vols.; Ottawa: Information Canada, 1976).
Ronald I. Cohen and Jacob S. Ziegel, The Political and Constitutional Basis for a New Trade Practices Act (Ottawa: Supply and Services Canada, 1976).
Corwin D. Edwards, Studies of Foreign Competition Policy and Practice, Vol. I: The United States (Ottawa: Supply and Services Canada, 1976).
T.D. MacDonald, R.G. Dale, Charles Stevenson, Jennifer Whybrow and J.P. Cairns, Studies of Foreign Competition Policy and Practice, Vol. II: European Economic Community, Australia, Japan, Sweden, United Kingdom and West Germany (Ottawa: Supply and Services Canada, 1976).
Neil J. Williams and Jennifer Whybrow, A Proposal for Class Actions Under Competition Policy Legislation (Ottawa: Information Canada, 1976).

Committee to examine and report upon the issues. The Committee members were Lawrence A. Skeoch, former Professor of Economics at Queen's; Bruce McDonald, a Toronto lawyer and former Professor of Law at Queen's; Reuben Bromstein, Toronto lawyer and Counsel for the Canadian Federation of Small Businessmen; William O. Twaits, well-known Canadian businessman and long-time Chairman of Imperial Oil of Canada Limited; and Michel Bélanger, who was at the time of his appointment the President of the Montreal Stock Exchange but whose participation in the Committee ceased after he became President of the Provincial Bank of Canada on April 1, 1976. By this time, the report of the Advisory Committee, commonly termed the Skeoch-McDonald Report, had been drafted and signed.* The Honourable Bryce S. Mackasey, the then Minister of Consumer and Corporate Affairs, asked the public to give its views on the proposals to assist in drafting the Stage II legislation. The Minister of Finance in August, 1976 published a White Paper on the Revision of Banking Legislation, part of which required implementation through a revision in competition policy.** The present Bill is sponsored by the current Minister, the Honourable Anthony C. Abbott, and reflects the experience gained over the past decade during which competition policy has been under intensive review.

In the present Bill, continued reliance is placed upon a modified Combines Investigation Act, to be renamed the Competition Act, which is

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* L.A. Skeoch with Bruce C. McDonald, Dynamic Change and Accountability in a Canadian Market Economy (Ottawa: Supply and Services Canada, 1976).

** White Paper on the Revision of Canadian Banking Legislation, Minister of Finance, Ottawa, 1976.

designed to maintain effective competition and thus assist in fostering the "dynamic change and accountability in the Canadian market economy" which the Minister's Advisory Committee consider essential to its sound development. It would establish the means whereby mergers and specialization agreements may be examined with a view to promoting the benefits of large scale production and distribution on the one hand while preventing the bad effects of economic concentration on the other. Through the utilization of both civil and criminal procedures, it seeks to deal more effectively with monopolization, price discrimination and private international agreements. The Bill deals specifically for the first time with interlocking management, and systematic delivered pricing. Virtually all of the many recommendations relevant to competition policy of the Select Committee on Trends in Food Prices have already been enacted in Stage I.

CHAPTER II

Existing Provisions of the Combines Investigation Act

As it reads today, complete with Stage I amendments, the Combines Investigation Act applies to all business activities to the extent that they are not subject to regulation or exemption by valid legislation. The bona fide activities of trade unions and of their management counterparts are expressly exempted from the legislation as are certain activities of fishermen, security underwriters and amateur sporting leagues.

The Act is administered through two institutions, the Director of Investigation and Research and the Restrictive Trade Practices Commission, and is enforced through the Commission and the Criminal Courts. Provision is made for the appointment of four Commissioners, and the Director may be provided with one or more Deputy Directors. The Minister of Consumer and Corporate Affairs is responsible to Parliament for the program. The Director is required to report to the Minister annually and the Minister must table the report in Parliament.

Prohibited Behaviour

Part V of the Act proscribes certain anti-competitive agreements as well as participation in mergers or monopolies that operate to the detriment of the public or are likely to do so. These activities are punishable on indictment, as is compliance with foreign directives to participate in restrictive agreements contrary to the Act, bid-rigging, conspiracy to interfere with the opportunity of professional athletes to participate and negotiate as defined in the section, price discrimination and predatory pricing as defined, and the

granting of promotional allowances or their equivalent on disproportionate terms to competing purchasers. False and misleading advertising; various forms of misleading representations to the public concerning prices, warranties and guarantees, tests and testimonials, and the terms under which promotional contests are held; failure to supply adequately at bargain prices; bait and switch selling; and sales above advertised prices are all forbidden and punishable on indictment or summary conviction or both. Double ticketing is forbidden as is the promotion of pyramid and referral selling schemes not licensed or permitted by provincial law. The practice of price maintenance is an indictable offence as defined in the section which forbids a supplier of a product or credit from attempting to influence distributors to maintain or raise prices or from refusing to supply someone because of a low pricing policy. This prohibition also extends to parties which attempt to induce a supplier not to sell products to another person because of that person's low pricing policy.

Matters Reviewable by the Commission

Part IV.1 of the Act was enacted in the Stage I revisions for the purpose of setting up a civil procedure whereby certain trade practices, having potential for either public benefit or public detriment, could be appraised by the Commission acting in a quasi-judicial capacity.

If, on an application brought before it by the Director, the Commission finds that a situation is anti-competitive within the terms of the relevant sections, it may, after affording the parties reasonable opportunity to be heard, make corrective orders as set out in the legislation. Persons against whom an order has been made may, by way of application, request the Commission to rescind or vary one of its orders by reason of changed circumstances. For the purposes of Part IV.1, the Commission is a Court of Record.

The practices and situations to which this procedure applies under the present Act include certain types of refusal to deal, consignment selling, exclusive dealing, market restriction and tied selling. Provision is also made for the Commission to review and correct situations where judgments of foreign courts or foreign laws or directives have anti-competitive effects in Canada. Similarly, the Commission may issue an order to correct the situation when a foreign supplier refuses to sell to a Canadian buyer because of exertion of pressure upon the supplier by someone outside Canada.

Provisions Relating to Procedures

Inquiries under the Act are commenced on the direction of the Minister, on the initiative of the Director or on a statutory application by six citizens. General research inquiries may be commenced on the initiative of the Minister, the Director, or the Commission.

In conducting an inquiry under the Act, the Director, is given wide powers to secure the production of documents by searching the premises of companies under inquiry, by requiring them to produce documents pursuant to an order for return of information, or requiring individuals to produce documents before a member of the Commission or a hearings officer while giving evidence under oath concerning their business activities. When any of the special powers are to be exercised, the Director must make an ex-parte application to a member of the Commission for certification authorizing the use of these powers. Special provisions are contained in the Act which allow documents in the possession of individuals to be used as evidence in a prosecution and to serve as prima facie proof of what they relate, including the status of the writer as an authorized representative of his company or firm.

When the Director is of the opinion that any inquiry under the Act should be discontinued for lack of evidence or content, he may discontinue it. However, agreement of the Commission is required in any instance in which evidence has been brought before it. In either event, the discontinuance must be reported to the Minister who, in turn, reviews the decision to discontinue and may either accept it or instruct the Director to make further inquiry.

In a continuing inquiry into an alleged offence, the Director has two courses open to him when he has gathered sufficient evidence. First, the Director may transmit the inquiry to the Attorney General of Canada for such action as the Attorney General may be pleased to take, usually criminal prosecution. In misleading advertising and price advertising cases, which may be taken before provincial judges for summary trial, the evidence has, as a matter of routine, been referred to the Attorney General for his disposal, usually by prosecution. The same action has often been taken in respect of indictable offences when they have not raised any unusual issues of fact or law requiring the appraisal of the Commission.

Second, the Director may prepare a Statement of Evidence for transmission to the Commission and to each person against whom an allegation has been made. The Act requires the Commission, on receipt of the Statement, to fix a date for hearings at which the Director may argue in support of his position. The parties against whom allegations are made have full opportunity to be heard in person or by Counsel. No report may be made against anyone unless such full opportunity to be heard has been accorded to him, and the Commission has always interpreted this as including the right to present both oral and documentary evidence as well as to challenge the Director's position. Moreover, the oral evidence which a person is required to render at such hearings shall not be used or be receivable

against such person in any criminal proceedings thereafter instituted against him, other than for perjury in giving such evidence or a prosecution under specified provisions of the Criminal Code.

As soon as possible after the conclusion of such hearings, the Commission is required to submit a written report to the Minister which reviews the evidence, appraises the effect upon the public interest of arrangements and practices therein disclosed, and contains recommendations as to the application of remedies. Within thirty days after its receipt, the Minister must make the report public unless the Commission recommends in writing that the public interest would be better served by withholding publication, in which case the Minister must decide on whether the report, either in whole or in part, shall be made public. When such report has disclosed an offence, the Minister has normally referred it to the Attorney General of Canada so that the offenders may be prosecuted, in addition to seeking any other remedy which may have been recommended by the Commission.

Special Remedies

In Part IV, the Act sets out a number of "Special Remedies" in addition to, or in lieu of, prosecution for a criminal offence. The special remedies are as follows:

a) The Governor in Council is empowered to remove or reduce the customs duty on an article when, as a result of an inquiry under the Act or judgment of a Canadian Court, it appears that there have been restrictive trade practices detrimental to the public affecting that article.

b) The Attorney General of Canada may exhibit an information in the Federal Court alleging that a patent or a trademark has been used to restrain trade and the court may make orders to

correct the situation, the ultimate being the revocation of the patent or the expunction of the trademark.

c) The Attorney General of Canada may, under defined conditions, apply to a court for an interim injunction whenever someone has committed or is likely to commit an offence against Part V of the Act or disobey an order of the Commission under Part IV.1.

d) A court is empowered, at the time of conviction or at the behest of the Attorney General of Canada within three years thereafter or when the Attorney General shows that someone has or is likely to commit an offence, to make a prohibition order forbidding the continuation or repetition of the offence, the commission of acts directed towards this end, and in the case of mergers or monopolies, may order their dissolution.

e) Finally, any person may sue for damages incurred as a result of loss or damage arising out of an offence against Part V or the failure of anyone to comply with an order of the Commission or a court made under this Act. Such damages may be equal to the total loss or damages proven, together with the full costs of the action.

Additional Provisions

The remainder of the Act, the text of which is fully set out in the Appendix, is taken up with definitions, administrative and procedural provisions relating to the carrying out of the objectives of the Act, including hearings before the Commission and prosecutions in the courts. The proposals of Stage II will not affect many of these fundamental elements or most of the substantive provisions of the Combines Investigation Act.

CHAPTER III

Stage II Amendments and their Rationale

A. New Names

When the Combines Investigation Act was first passed in 1910, its long title was "an Act to provide for the investigation of combines, monopolies, trusts and mergers". "Combine" was defined as a combination, trust, monopoly or merger, and this definition remained in the Act until it was expunged by the amendments of 1960. The 1910 Act only came into play when six citizens formally complained that a combine was in existence in relation to a commodity. Its prime purpose was to set up the machinery for investigating the facts associated with these complaints although remedies were provided to supplement one which had been in the Criminal Code since 1889.

During the nearly seventy years since its introduction the Act has been amended a number of times. Its scope has been extended to cover the whole of the unregulated private sector in relation to goods and services and a Commission has been established with power to make binding orders upon businessmen for the correction of certain restrictive business practices. In addition it has defined numerous offences to deal with deliberate anti-competitive behaviour in the marketplace. Now, neither the word "combine" nor "trust" appears anywhere in the statute.

In recognition of all these changes, and with the purpose of emphasizing the positive rather than the negative aspects of the legislation, it is proposed by the present Bill to change the short title of the statute to "The Competition Act". The long title would become: "an Act to provide for the

general regulation of trade and commerce by promoting competition and the integrity of the marketplace, and to establish a Competition Board and the office of Competition Policy Advocate". The last name would be substituted for the present Director of Investigation and Research, and the Competition Board would supersede the Restrictive Trade Practices Commission.

B. Preamble

The precise purposes of the Combines Investigation Act as it relates to anti-competitive situations and practices have frequently been the subject of debate and speculation.* In the absence of a preamble, reliance has been placed upon ministerial statements, deductions from the provisions of the Act and pronouncements from the bench. It is quite possible that a preamble would have been of assistance to the courts in their interpretation of such words as "detriment to the public" stemming from mergers and monopolies and "lessen unduly, competition" in connection with the prohibited collusive arrangements. The responsibilities which are to be placed upon the Competition Board to assess complex economic factors such as those which are relevant in mergers, renders even more desirable a statement by Parliament of the socio-economic purposes of the Act.

The Economic Council has pointed out that while the maintenance of competition has frequently been cited as the purpose of the Act, competition is really a means rather than an end in itself. Moreover, while competition is a condition generally to be sought, the single-minded pursuit of

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* See, for example, Economic Council of Canada, Interim Report on Competition Policy (Ottawa: Queen's Printer, 1969), pp. 6-9.

competition could in some circumstances be either unattainable or too costly in terms of its effects on other goals, such as the realization of economies of scale. The Council's view was that efficiency rather than competition should be the goal and that in most but not all circumstances, competition should be the means to that end in the context of competition policy. The Council stated:

> "It will be a recurrent theme of this Report that Canadian competition policy should aim primarily at bringing about more efficient performance by the economy as a whole. Competition should not itself be the objective but rather the most important single means by which efficiency is achieved."*

The language of the Skeoch-McDonald Report was different but its thrust was much the same. For them the question was how to facilitate the essential process of economic change. With the caveat that concentration must be permitted where necessary for the achievement of real-cost economies, they called for a market economy "in which the dynamic variables are kept free, with a fairly freely functioning price system".

Those ideas of the Economic Council and Skeoch-McDonald have met with a very wide measure of public acceptance in Canada, and their influence on the wording of the preamble is apparent.

The first paragraph in the preamble serves to place the Competition Act in the context of certain basic goals of Canadian public policy. They

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* Ibid., p. 9.

include an economic environment that ensures efficient allocation of resources, stimulates innovation, expands trade opportunities and encourages equitable distribution.

The second paragraph deals with certain factors which are requisite to the achievement of the foregoing goals and which are of particular relevance in the context of competition policy. What is required is the creation of a flexible, adaptable and dynamic Canadian economy, with emphasis upon the removal of barriers to mobility, the discouragement of concentration and the predatory exercise of economic power, thus reducing the need for detailed regulation. Linked with that, however, is the reservation that the pursuit of such an economy must be tempered where it conflicts with the achievement of economies of scale or other savings of resources.

The third paragraph which is clearly placed in the context of the preceding ones, makes the encouragement of competition a matter of national policy by means of the enactment of general laws of general application.

C. Administrative and General Provisions

1. The Competition Policy Advocate

The principal executive officer under the new Act will be the Competition Policy Advocate. His proposed functions will be essentially the same as those now performed by the Director of Investigation and Research under the Combines Investigation Act. However, new provisions, together with those passed in Stage I, greatly enlarge the scope of these duties and responsibilities. Aside from a wide range of matters for inquiry, he will play a more active role as active advocate of competition policy in interdepartmental matters, including involvement with the proceedings of government

regulatory boards and agencies. Provision is made as now for the designation of Deputies to assist the Advocate and to carry out the responsibilities of that office when the latter is absent. Further details of the Competition Policy Advocate's new responsibilities will be described in setting out the other provisions of the Bill in the ensuing pages of the review.

The Minister of the Department of Consumer and Corporate Affairs would, of course, continue to carry basic responsibility for Canada's competition policy under the new legislation.

2. The Competition Board

The Stage II Bill proposes that the Restrictive Trade Practices Commission be replaced by the Competition Board, whose responsibilities would be confined to those associated with a quasi-judicial role. The Board will be relieved of the Restrictive Trade Practices Commission's functions of serving as a hearing body before which the Director examines witnesses during an inquiry, of reviewing evidence and argument concerning Statements of Evidence submitted by the Director and reporting upon them to the Minister. The Commission's functions in respect of examination of witnesses by the Director will be entrusted to Hearings Officers, as is described in another section below. Statements of Evidence will no longer be prepared, and the Competition Policy Advocate will refer all evidence of infractions of the criminal provisions to the Attorney General of Canada for possible legal action.

The function of hearing applicatons from the Competition Policy Advocate in connection with reviewable trade practices and the rendering of remedial orders (which was introduced in the Stage I legislation as Part IV.1 of the Act) would be enlarged and would become the principal task of the Board. As a Court of Record, the Board would

have only quasi-judicial functions and ancillary enforcement powers and duties. Because of its increased workload consequent upon the heavier duties it will be assigned, the Board will consist of five to seven permanent members, at least one of whom will be in receipt of a salary or annuity under the Judges Act or be a barrister or advocate of not less than ten years standing at the bar of a province. One of the permanent members of the Board will be appointed by the Governor in Council to be Chairman of the Board and will serve as its chief executive officer. Provision is made for the appointment of a Vice-Chairman to act in the absence of the Chairman. In addition, there would be not more than five associate members. The permanent members would be appointed for terms not exceeding ten years. Associate members would be appointed for up to three years. Three members of the Board, of whom at least one is a permanent member, will constitute a quorum of the Board. A panel of the Board would include three or more members, one of which must also be a permanent member.

In its Interim Report on Competition Policy, the Economic Council of Canada strongly endorsed the idea of changing the emphasis of competition policy legislation from criminal to civil procedure in respect of a number of specified practices which are capable of producing good or bad effects depending upon surrounding circumstances. It proposed the establishment of a Competitive Practices Tribunal empowered to issue the necessary judicial orders. The Council would also have given concurrent powers to the Tribunal to express itself on matters of policy. Bill C-256 followed many of those recommendations. The main criticism of the proposed Tribunal during public debate of this Bill was that the Tribunal would be too powerful because it was intended to exercise functions which were simultaneously executive, legislative and judicial.

The civil law role conferred upon the Restrictive Trade Practices Commission under

Bill C-2 was limited to a few specified trade practices upon which a broad consensus had been reached. Moreover, the criteria to be applied in the adjudication process were spelled out in the Statute in order to provide safeguards appropriate to a quasi-judicial process. These provisions will be retained in the revised legislation.

The report of the Minister's Advisory Committee on Stage II recommended that the Restrictive Trade Practices Commission be abolished and a Board appointed in its stead. The report further recommended that the Board's duties be confined to the implementation of the objectives of a market economy specified in the new legislation. The Board would be authorized to make binding orders in connection with applications brought by the Director for the review of mergers and trade practices and in connection with applications by affected parties for review of proposed specialization and export agreements. The Commission's duties of acting as an intermediate hearings body, of initiating research inquiries, and of reporting and recommending remedies to the Minister were all to be abolished. It was further recommended that no executive or legislative powers should be superimposed on the judicial function of the Board and that its members be persons of broad experience in economics, law, business and public affairs.

Thus, the proposed legislation relieves the Board of the Commission's present responsibilities in respect of criminal inquiries. Concurrently, it extends the use of civil procedures for a balanced review of business situations and practices which may operate to the advantage or detriment of the public, depending on the particular circumstances. Since the Board will no longer report to the Minister upon investigations and research inquiries, it will have achieved a substantial amount of statutory independence. Compliance with the orders of the Board will be exercised through the Federal Court.

3. General or Research Inquiries

Section 47 of the Combines Investigation Act provides that, in addition to inquiries effected as a result of the Director's initiative, the Restrictive Trade Practices Commission or the Minister may cause the Director to undertake research inquiries into conditions or practices related to monopoly or restraint of trade and to submit these findings to the Commission. In addition, the Minister may direct the Director to carry out a general inquiry into any matter that the Minister certifies to be related to the policy and directives of the Act. The Commission, in turn, holds hearings and prepares a report for submission to the Minister for mandatory subsequent publication.

A new section 47 is proposed in the Stage II Bill which would repeal these provisions and provide instead that the Competition Policy Advocate, either on his own initiative or on direction from the Minister, may inquire into any problem involving competition policy. In the conduct of such an inquiry, the Competition Policy Advocate will have the same powers, under section 8 as amended, of obtaining evidence and information that he will have in the conduct of other investigations. He would be able to discontinue an inquiry at any stage if no useful purpose would be served by its completion. On completion of each inquiry, the Competition Policy Advocate would be required to submit a report to the Minister and to each person from whom information was obtained through the use of the Advocate's compulsory powers. Such persons would then be entitled to apply within sixty days to the Minister to appoint a commissioner with the powers conferred by the Inquiries Act to reopen the inquiry. The commissioners, not to be confused with members of the present Restrictive Trade Practices Commission, would be persons who were not members of the Board. The Minister could appoint a commissioner in response to such a request or on

his own initiative, in which case the commissioner would afford reasonable opportunity to be heard to those making the application and would do whatever is necessary to supplement or complete the report of the Advocate. The Minister would be required to publish, within set time limits, reports of commissioners or of the Competition Policy Advocate when no commissioner was appointed.

The proposed arrangement will relieve the Board of a non-judicial function while still providing machinery for independent evaluation of the results of general inquiries when required.

4. Agreements with Other Countries

Canada, with its heavy dependence upon foreign trade and as a host to many multinational enterprises, has a particular interest in bilateral and multilateral arrangements for co-operation in the prevention of restrictive business practices. Such practices entered into abroad or directed from abroad may have adverse effects on Canadian trade. Also, other countries may apply their competition laws in ways which have adverse effects upon Canadian trade and development, especially where multinational enterprises with affiliates in Canada are involved.

Canada has had consultative arrangements with the United States on anti-trust matters since 1959 and with other O.E.C.D. countries since 1967. While modest in scope, these arrangements have been useful. Participating countries notify one another of anti-trust cases likely to have international effects. In addition, procedures for consultation, where restrictive practices or anti-trust enforcement in one country may affect the interest of another country, have been developed. In 1976 the O.E.C.D. countries agreed upon guidelines for multinational enterprises, including guidelines on the avoidance of restrictive business practices. The developing countries have recently become

involved as well in discussions within the United Nations looking toward world wide co-operation in anti-trust matters, and Canada is participating in those discussions. The Economic Council's Interim Report on Competition Policy referred to the need for more international co-operation in anti-trust matters, including co-ordinated policy action.

The present Bill provides a foundation for Canadian participation in international discussions on more meaningful co-operative arrangements as such opportunities arise. It provides that the Government may enter into agreements with any government for the elimination of private restrictions of international trade and assistance in the administration and enforcement of laws relating to the safeguarding of competition or the exchange of information related thereto, and permits the Competition Policy Advocate to supply or receive such information, having due regard to requirements of confidentiality.

5. Evidentiary Provisions

A number of provisions related to the collection and use of evidence are contained in the Stage II Bill. Some of these proposals were occasioned by the changed functions of the Commission while others represent an effort to update and strengthen these aspects of the legislation.

The Act at present covers collection of evidence in the form of books, papers, records or other documents, but it has been found by experience that on occasion other things may constitute evidence in prosecutions under the Act. For example, relevant evidence may be found to be recorded on tapes as well as being found printed or written on documents, or an article may be required as evidence in a case of misleading advertising. Accordingly, the section providing for the search of premises and copying or seizing evidence requires amendment to provide that things may be taken for evidentiary purposes.

The Bill also takes account of the advent of the computer as a means of storing company records. The Competition Policy Advocate or his representative, in seeking to examine records on business premises, may find that certain records are only retrievable through a computer terminal connected to a central located elsewhere in Canada or even abroad. The Bill provides for the retrieval of such records and their admissibility as evidence.

Another provision deals with situations where the solicitor-client privilege is claimed in respect of documents or things selected by representatives of the Competition Policy Advocate as evidence in an inquiry. It states that such material shall be placed in an identifiable sealed package and forwarded to an officer of a court or a mutually agreed upon person for safekeeping. A judge of the Federal Court or a superior court in the province in which the document or thing was found, sitting in camera, may rule on the question of privilege. Should an application for the determination of privilege not be made within ten days after the items were placed in custody, any judge shall, on an ex-parte application by or on behalf of the Competition Policy Advocate, order the documents or things to be delivered to the Competition Policy Advocate. This provision is merely an adaptation of a similar arrangement contained in the Income Tax Act. Naturally, a finding that privilege applies to a document or thing bestows on its owner the right to deny its surrender for evidentiary purposes.

In keeping with the proposal to eliminate the involvement of Competition Board members in hearing evidence during a preliminary inquiry by the Competition Policy Advocate, the Bill removes the power of a Board member to call witnesses on his own motion or to preside over these hearings. In its place, a provision would require that a person who is not otherwise associated with the Board be named by a member of the Board to serve as hearings

officer and preside over such a hearing. The Board would still be able to order the attendance of a witness for purposes of examination on oath or the production of evidence at such hearings on an ex-parte application by the Competition Policy Advocate. A person being examined under oath would still be permitted to appear with Counsel. As is presently the case, however, oral evidence secured at these hearings could not be used in criminal proceedings against the person rendering it except in prosecutions for perjury.

The Competition Policy Advocate is required by one clause of the Bill to send back the original or a copy of documents obtained in a search within sixty days of their seizure as contrasted to the forty day limitation in the present Act. Similarly, all things other than documents would have to be returned within the same time unless they were required for prosecution or in connection with an application to the Board for an order. Alternatively, things could be returned on the condition that they be retained unaltered for such reasonable period as the Competition Policy Advocate may designate.

A revised section which is in line with present procedures, would provide that inquiries by the Competition Policy Advocate, including all examinations of witnesses by hearings officers, shall be held in private. In accord with their judicial character, however, all proceedings on applications to the Board must be in public except when the Chairman of the Board orders that some or all of the proceedings should be in private. In addition, a new provision makes it clear that no information obtained in the course of inquiries is to be disclosed by the Competition Policy Advocate or his staff except for purposes of the Act, and a penalty for violation is provided.

6. Other Special Remedies

The Advisory Committee on Stage II advanced the recommendation that persons injured or threatened injury by anti-competitive conduct should have legal means of protection and redress. A beginning has been made toward the attainment of this objective through the provision in the Stage I legislation that, when someone suffers loss or damage by reason of conduct constituting an offence under Part V of the Act or resulting from disobedience of an order of a Court or of the Restrictive Trade Practices Commission, the injured party may sue for damages up to the loss or damage proved plus the cost of the proceedings. The record of the Court or Commission is admissible in evidence as prima facie proof of any facts it contains as to the conduct of the person being sued and as to the effects of his behaviour upon the person bringing the action. The Bill extends this provision by empowering a court to grant any other remedy or relief which, by reason of its general jurisdiction, it has authority to grant. The court might, for example, issue a prohibition order as a form of relief. The proposal in the Bill respecting a provision for class and substitute actions is described in another part of this chapter.

Several additional provisions are proposed in the Stage II Bill. The first proposed special remedy empowers the Competition Board, on application by the Competition Policy Advocate, to make interim injunctions in situations where it appears that someone has engaged or is about to engage in conduct in respect of which an order could be issued by the Board. This remedy is analogous to that which applies to interim injunctions issuable by a Court to deal with offences or threatened offences under the Act on application by the Attorney General of Canada pursuant to section 29.1 of the Combines Investigation Act. These latter provisions would not only be retained but would be clarified to permit the Court to grant an interim

injunction on the basis of a prima facie case that serious injury is threatened. Suitable provisions are included to ensure that the interests of both sides are protected and that related proceedings are expeditiously concluded. In each case, the Board or the Court would grant an injunction only in situations where it appears that competition would be seriously injured by the conduct of the party against whom the complaint is made or that serious injury to the business of another person was threatened.

Another proposed special remedy allows the Court to issue a prohibition order at any stage before conviction of an accused under Part V in lieu of continuing the proceedings. The provision requires the Attorney General of Canada or the Attorney General of the province in which the trial is being held and the accused to consent to this procedure. Generally, this procedure could be expected to find use in those cases where an early remedy is of paramount importance or where a protracted trial is neither in the interest of the public or the parties.

7. Regulated Conduct

Both the Economic Council and the Minister's Advisory Committee on Stage II addressed themselves to the competition policy aspects of regulated industries and the interface between the statutory provisions establishing the regulatory authority and the Combines Investigation Act. Bill C-256 proposed several provisions on this matter in recognition of the growth in the number and scale of productive activities subject to regulation at various levels of government and the potential conflict with the provisions of the Combines Investigation Act.

In accordance with the decision of the Supreme Court of Canada in Reference re the Farm Products Marketing Act,* regulatory schemes based upon valid legislation were found not to be "to the detriment or against the interests of the public", as the merger and monopoly provision of the Combines Investigation Act requires, nor were they considered to be means of unduly limiting or preventing competition within the meaning of section 411 of the Criminal Code, the wording of which is now in section 32 of the Act. Anti-competitive conduct not expressly approved by the regulatory statutes would probably be covered by the Combines Investigation Act. Such an interpretation would be consistent with the jurisprudence in the Canadian Breweries case** where it was held that regulated activities are exempt from the Combines Investigation Act where a Board has been given power under valid legislation to regulate and has in fact exercised the power. The judgment in question specifically pointed out that the exemption would not apply to firms under such regulation which engaged in anti-competitive conduct so as to prevent the Board from effectively exercising its jurisdiction.

However, there remains considerable doubt about the precise extent of the exemption for regulated activities. Many of the prohibitions and reviewable practices do not contain words such as "detrimental to the public" or "unduly limiting competition" which have been dealt with by the courts. Moreover, the degree of regulation required to qualify for an exemption is in some doubt.

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* 7 D.L.R. (2d) 257; 1957 S.C.R. 198.

** Supra.

The Economic Council recommended that the unregulated activities of regulated industries should be subject to the Combines Investigation Act. It urged that the underlying principles of competition policy ought to be applied, in suitably modified form, to the regulated sector of the economy. The Council also recommended that all mergers approved by any regulatory board be first scrutinized by the competition policy authorities. The Council felt that legislatures should review regulatory legislation on an ongoing basis to ensure that the mandate of the regulatory boards is as clear as possible and determine whether there is a continued need for such legislation. The Council recommended that the views of the Department of Consumer and Corporate Affairs should be sought whenever important federal regulatory policies were being considered. The Council was concerned about the hidden costs of such regulation and recommended that the Department undertake research to review the quality of performance of regulated industries.

The Advisory Committee on Stage II further recommended that regulated industries should be generally subject to the Combines Investigation Act. They should only be exempt to the extent that restrictive conduct is specifically authorized by the governing statute and to the extent that the restrictive conduct is actively supervised by independent officials and not representatives of the participants. It was suggested that the only restrictions be those necessary for the achievement of the specified legislative goal and that they be applied in a manner which had the least effect on efficient competitive behaviour. The report recommended the institution of broad research programs under the Act in connection with the regulation of monopolies with the goal of increasing the accountability of the public monopoly sector of the economy.

Some of the Advisory Committee recommendations were previously enunciated in Bill C-256. One such provision permitting the Director to intervene in

the interests of competition when requested to do so by federal boards was enacted in the Stage I legislation. It was, in fact, extended to permit him to make such interventions upon his own initiative whenever representations about the maintenance of competition is relevant to the matter before the board in question.

The present Bill, in recognition of the potential conflicts, in fairness to those who might inadvertently commit an offence under the Combines Investigation Act, and to discourage unnecessary interference with competition, defines the relationship between regulatory statutes and the Act. The Bill would exempt from the scope of the Competition Act activities expressly required or authorized by a public regulatory agency which is not appointed by the persons being regulated. The exemption would not apply if such agencies did not regulate activities in a manner expressly set out in their governing statute. On the other hand, the provisions of the Competition Act would not apply in such instances if they would interfere with the attainment of the primary objectives of the regulatory provisions. Federal regulatory agencies would be required to achieve their objectives in a manner least restrictive of competition, where consistent with their statutory objectives. Failure to observe that provision would be grounds for appeal against a decision of the agency by the Competition Policy Advocate but by no one else.

The status of the Competition Policy Advocate in appearing before federal regulatory agencies will be made stronger than that which the Director now has. He will be authorized to intervene to make representations in respect of any aspect of competition policy as expressed in the preamble to the Competition Act, with all the rights of a party including the right of appeal.

In the course of the drafting of the exemption for regulated conduct, it was found that the section as drafted could create certain problems of

uncertainty in the setting of transport rates which fall under federal regulation. One such potential problem was the membership of Canadian airlines in the International Air Transport Association (I.A.T.A.). On January 27, 1977, Bill C-33 to amend the National Transportation Act and the Department of Transport Act was introduced for first reading. Accordingly, the Bill includes a proposal to enact section 3.3 of the National Transportation Act. The section provides:

> "3.3(1) The Governor in Council may, if he is satisfied after due consideration of the desirability of maintaining competition that an exemption as referred to in this subsection is necessary for greater efficiency or economy of transportation, by order with the approval of the Minister of Transport and the Minister of Consumer and Corporate Affairs and after the Director of Investigation and Research appointed under the Combines Investigation Act has been notified of the terms of the proposed order, exempt from the application of section 32 of the Combines Investigation Act any conduct that is imposed or required by an order or regulation made by the Commission that is specifically referred to in the order made pursuant to this subsection and that was made by the Commission for the fulfilment of a direction issued to it under section 3.2 of this Act.
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> (2) In any prosecution under subsection 32(1) of the Combines Investigation Act, the court shall not convict an accused if the conduct that is in question in the prosecution is conduct that is exempted from the application of section 32 of that Act by an order made pursuant to subsection (1)."

8. Chartered Banks

Both the White Paper on Banking* and the recent report of the Economic Council of Canada on the operation of deposit institutions** have called for a widening of the scope for competition in the banking industry and a lowering of the barriers to entry. Similar recommendations have been presented in other reports and were an important source of concern at the time of the last decennial review of the Bank Act. Successive legislative measures have incorporated provisions intended to halt the trend towards further concentration in the chartered banking industry. While that trend has not been reversed, the White Paper on Banking notes that the proportion of total public deposits held collectively by the chartered bank has been declining over the past few years. This result can perhaps be attributed in large measure to the competition from near banks and other deposit-taking institutions made possible by recent banking legislation.

In Bill C-256, it was proposed that provisions for the maintenance of competition be written into the Bank Act and that their administration be assigned to the Inspector General of Banks, an officer responsible to the Minister of Finance. This decision was followed in the several bills which culminated in the Stage I competition legislation which became effective on January 1, 1976. In this legislation, section 102.1 of the Bank Act was revised to exclude from the application of the Combines Investigation Act all agreements between or among banks as well as mergers between banks. Those matters would otherwise have become subject

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* Supra, p. 5.

** Economic Council of Canada, Efficiency and Regulation: A Study of Deposit Institutions (Ottawa: Supply and Services Canada, 1976).

to sections 32 and 33, respectively, of the Combines Investigation Act consequent upon the extension of that Act to include services generally.

Correspondingly, the Bank Act was amended both to provide machinery for inquiries by the Inspector General into anti-competitive behaviour and to establish more stringent provisions defining such behaviour. The Inspector General already had all the powers of a Commissioner under the Inquiries Act for the purpose of obtaining evidence. Also, it was already an offence under the Bank Act for a representative of one bank to knowingly make an agreement with another bank concerning the rate of interest on a deposit or the interest and charges on a loan. The Stage I competition legislation strengthened this provision by extending the ban on collusion to include agreements on service charges, the amount or kind of a loan, the kind of service to be provided to a customer, or the classification of persons to whom loans would be extended or withheld. Moreover, breach of these provisions, incorporated in section 138(1) of the Bank Act, was made an indictable offence as of January 1, 1976. The same section, both before and after the amendments, exempted collusive agreements dealing with deposits or loans made or payable outside Canada, those concerning a joint customer, those concerning the underwriting of securities, and those requested or approved by the Minister of Finance.

With the extension of the ban on collusion among banks effected by the Stage I competition legislation came a widening of the exemptions, and the following additional classes of agreements are presently exempted by section 138 of the Bank Act:

a) those relating to the exchange of statistics, credit and technical information, joint research and the restriction of advertising;

b) those concerning insured loan programs authorized by legislation;

c) those concerning services and charges to customers outside Canada; and

d) those dealing with the eligibility of customers outside Canada to receive loans or services.

The Bank Act already contained a provision whereby all mergers of chartered banks require the agreement of the Minister of Finance and approval of the Governor in Council. With the Bank Act provisions thus strengthened, the Stage I competition legislation, as indicated above, went on to provide that the provisions of the Bank Act relating to collusive agreements and mergers would apply to banks and would supersede sections 32 and 33 of the Combines Investigation Act.

As noted earlier, the leading feature of the Stage I competition legislation was that it brought most services and service industries within the ambit of the Combines Investigation Act. That brought banks under the Combines Investigation Act except to the extent they had been expressly excluded by section 102.1 of the Bank Act. Thus, banks are now bound by the Combines Investigation Act with respect to the offences of monopoly, predatory pricing, price maintenance and those relating to consumer protection as well as being subject to the Commission on all relevant reviewable practices.

It became clear during preparation of the Stage II competiton legislation that the continued division of responsibility for competition policy in banking was likely to be inefficient based on the jurisdiction shared by the Competition Policy Advocate and the Inspector General. It was also considered that this division of responsibility was inconsistent with the government's proposals in the present Bill to promote competition policy through the specialized agency of the Competition Policy Advocate. Moreover, the existing situation could

create the impression that some difference is intended between the nature and intensity of competitive behaviour in the financial sector and the rest of the economy. Such an impression would be very undesirable in view of the importance of the banking system in a market economy and of the observed high concentration which has characterized chartered banking in Canada. Accordingly, with the exceptions noted below, the present Bill proposes to vest responsibility for the enforcement of competition in the banking industry in the Competition Policy Advocate. This adheres to the following proposals in the White Paper on Banking:

> In view of the comprehensive revisions of competition legislation and in order to concentrate in a single organization, as far as possible, responsibility for the administration and enforcement of combines legislation, it is proposed that those areas (agreements and mergers now under the Bank Act) also be made applicable to banks under the Combines Investigation Act.
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> ...the Minister of Finance will continue to have authority to approve agreements among banks that are desirable for reasons of monetary or financial policy. Secondly, it will be a requirement that the Minister of Finance be consulted in respect of all mergers between banks and that he have the power to authorize such mergers which, in his view, are in the interests of the stability of the financial system.*

These recommendations would be implemented by the repeal of sections 102.1 and 138 of the Bank Act. To the extent that exclusions presently in

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* Op. cit., p. 46.

section 138 of the Bank Act are not already incorporated into section 32(2) of the Combines Investigation Act, the Stage II Bill proposes that specific clauses be enacted for this purpose. Thus, exemption would be provided for agreements or arrangements between or among banks concerning the following:

a) services rendered among banks (e.g., one bank representing another bank in a geographical area where the second bank does not normally do business);

b) a customer of each bank when the customer is made aware of the agreement or arrangements (e.g., a syndicate of banks underwriting a large loan);

c) between the banks and a customer of one or more of these banks concerning services to be supplied to customers of the customer (e.g., the payment of utility invoices);

d) for the utilization or development of common facilities (e.g., clearing houses);

e) the terms and conditions of guaranteed or insured loans under legislation (e.g., farm improvement loans);

f) those requested or approved by the Minister of Finance for the purposes of monetary or financial policy.

The first five exemptions, however, do not apply where the agreement or arrangement has lessened or is likely to lessen competition unduly in respect to price, quantity or quality of production, markets or customers, or channels or methods of distribution, or, if the agreement or arrangement has restricted or is likely to restrict entry into a market or expansion of a business. In addition to the foregoing exclusions, mergers of banks which

the Minister of Finance recommends to the Governor in Council for approval because they are necessary for the stability of the banking system would be excluded. The Minister of Finance would be required by the Bill to notify the Competition Policy Advocate of the facts when the Minister exercised his discretion in approving agreements or mergers.

In sum, under the proposed amendments to the Combines Investigation Act, the competitive behaviour of chartered banks would be subject to the Act except to the extent that the Bank Act empowers the Minister of Finance to approve restrictions upon competition for the purpose of securing the stability of the banking system or the advancement of fiscal and monetary policy and except for those specific forms of co-operation which were formerly endorsed by specific provisions in the Bank Act and which would now be transferred to the proposed Competition Act. Although the language is changed to conform with the Competition Act, the exemptions remain much the same as noted above.

D. Matters Reviewable by the Competition Board

As mentioned previously, a civil procedure of review involving the issuance of corrective orders was introduced with the enactment by Parliament of Bill C-2, the Stage I legislation. The practices which are now reviewable by the Commission include refusal to deal, consignment selling, exclusive dealing, market restriction, tied selling, implementation in Canada of the requirements of foreign judgments or foreign laws and directives, and refusal to supply by foreign suppliers.

Consideration of the foregoing matters will fall within the proposed Board's jurisdiction. The one dealing with foreign laws and directives will be slightly revised and a number of new reviewable matters will be added. The new and revised reviewable matters include:

1. Mergers;
2. Monopolization;
3. Intellectual and Industrial Property;
4. Interlocking Management;
5. Specialization Agreements;
6. Price Differentiation;
7. Foreign Conspiracies (revision of provision on foreign laws and directives);
8. Import and Export Restrictions by Affiliated Companies.

These proposals are broadly consistent with the recommendations presented by the Minister's Advisory Committee. They will be reviewed in the order listed.

The procedure with respect to all matters reviewable by the Competition Board has been designed to accommodate the requirements of natural justice. Notice must always be given to affected parties of any proceedings before the Board, and the Board is required to afford a reasonable opportunity to be heard in person or by counsel. Reviews would generally be initiated by the Competition Policy Advocate. Nonetheless, in cases where the interest of private persons is paramount, as in an application to cancel or modify an order of the Board or to register a specialization agreement, these private persons may apply directly to the Board for such reviews. This general procedure was approved by Parliament in respect of practices made reviewable in the Stage I legislation. The Restrictive Trade Practices Commission has formulated regulations for its implementation of the general procedure which illustrate how the Board would probably operate in practice.* In addition, members of the Board will no longer preside over the hearing of evidence during inquiries. As noted

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* Canada Gazette, Part II, Vol. 110, No. 6, pp. 1114 ff..

previously, this function will be performed by a hearings officer appointed for the purpose on an ad hoc basis by an order of the Competition Board. In summary, provision has been made for the impartial quasi-judicial treatment of issues.

Several additional safeguards are proposed in the present Bill. Before he may apply to the Board for an order, the Competition Policy Advocate must satisfy a member of the Board that a prima facie case exists. On reviewing an application, the Board, after affording an opportunity to be heard, may permit amendments of the application including the remedies applied for.

Another amendment makes it clear that the Board, in addition to being required to afford the parties an opportunity to be heard, may afford a similar opportunity to other persons whose business is likely to be substantially affected. Moreover, it is specified in the Bill that the Attorney General of a province may intervene on behalf of the province in any application before the Board.

Finally, the Bill specifies that the Board shall make its orders in terms which, while achieving their purpose, will interfere to the least possible extent with the rights of persons affected.

1. Mergers

In its Interim Report on Competition Policy, the Economic Council expressed considerable concern about the high levels of concentration in many Canadian Industries. Subsequent research has shown that about one-third of all manufacturing shipments in Canada are by industries in each of which the largest four enterprises account for 75 per cent or more of total industry shipments. As the Council pointed out, "the higher the level of concentration the more likely it is that certain undesirable

practices will occur",* such as explicit or implicit price agreements and anti-competitive trade practices. The Council took note of many studies which have shown higher than average profit to be associated with highly concentrated industries. According to the Council ability to maintain high profits over long periods of time is a sign "that something is amiss in the efficiency of resource use".**

While the Council noted that high concentration may be required in some industries to maximize efficiency, it concluded that industrial concentration was an element to be taken into account in the design of an effective competition policy. Moreover, the Council pointed out that "mergers between competitiors and between competitors and suppliers have an immediate and sometimes substantial effect on the structure of industry".*** The Skeoch-McDonald Report expressed the view that "action to deal with detrimental mergers and monopolies requires prompt attention". Like the Council, however, they stressed that many mergers had no detrimental effects on competition, while others were justified by resultant gains in efficiency.

Although there has been a section in the Act since 1923 which makes it an indictable offence to be party to a merger which has operated or is likely to operate to the detriment of the public, its enforcement has not been successful. Before World War II there was only one prosecution for a merger offence, the Western Fruits and Vegetables

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* P. 79.

** Ibid. p. 80.

*** Ibid. p. 82.

case, and it resulted in an acquittal.* Following this, there were no further prosecutions until the Canadian Breweries case** in 1959 and, shortly thereafter, the Western Sugar case.*** Both of these prosecutions also ended in acquittal. The Electric Reduction Company of Canada Limited pleaded guilty to a merger charge in 1970**** and K.C. Irving Limited was convicted of merger charges by the trial court in 1974 but the decision was reversed on appeal.***** In another case an order was issued against Anthes Imperial Limited in 1973 which prohibited it from acquiring Associated Foundry Limited. There has never been a conviction after a full trial which was not reversed on appeal.

The problem derives from the fact that the courts, working within a criminal law framework, have construed the public interest test very narrowly. Moreover, the courts have placed considerable emphasis upon a simple structural test which seemed to require proof that a virtual monopoly

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* Rex v. Staples et al. (1940) W.W.R. 627; 74 C.C.C. 178; 4 D.L.R. 699.

** Supra.

*** Regina v. The British Columbia Sugar Refining Company Ltd. et al. (1960) 129 C.C.C. 7; (1962) 38 C.P.R. 177; 32 W.W.R. (N.S.) 577.

**** Regina v. Electric Reduction Company of Canada Ltd. (1970) 61 C.P.R. 235.

***** Regina v. K.C. Irving Ltd. et al. (1974) 16 C.C.C. (2d) 49; 13 C.P.R. (2d) 115; 7 N.B.R. (2d) 360; 45 D.L.R. (3d) 45; (1975) 23 C.C.C. (2d) 479; 20 C.P.R. (2d) 193; 62 D.L.R. (3d) 157; (1975) 27 C.C.C. (2d) 263.

(i.e. 100 per cent) was created by a merger. As a result of this interpretation, the Director of Investigation and Research has not been able to implement a policy towards mergers based on the recognition that, while most mergers have no significantly adverse effects upon competition, a few of them do. Those in the latter category should be examined carefully and approved only where they offer promise of significant gains in efficiency. The assessment of competitive effects and likely gains in efficiency calls for examination of the surrounding circumstances in each case.

It was the recognition of this that led the Economic Council of Canada to propose that mergers be dealt with under a civil procedure by which the proposed Tribunal would balance desirable against undesirable implications of a particular merger to decide whether or not the net effect was in the public interest. The Tribunal would have been empowered to allow it to proceed as proposed, issue an order to block it unconditionally, or place conditions upon its continuance so as to overcome or reduce adverse social results inferred from the examination of particulars. In arriving at its decision, the Tribunal was to be guided principally by whether the merger would or would not lessen competition to the detriment of the consumer. This evaluation would include consideration of real cost savings, existing and new barriers to entry into the industry, concentration trends therein, and other related economic variables. Only those mergers referred to the Tribunal by the Director would have been examined. The Tribunal would have used the same approach in respect of all types of mergers, whether involving competing enterprises, the union of an enterprise with its supplier or customer, or those in which the merging enterprises are unrelated in terms of the kinds of business in which they engage.

The Advisory Committee on Stage II also recommended review of mergers by a Board charged with the duty of assessing mergers brought before it by the Director. The Board would have power to determine whether a merger or proposed merger is or is not against the public interest on much the same criteria as that recommended by the Economic Council. In addition, the Board would also have the power to issue the same types of directives as those proposed by the Economic Council. A merger would not be prohibited unless it was likely to give rise to significant restraints of an artificial nature, which would not be offset by real-cost economies.

In sum, the studies which have examined and made proposals for reforming the existing public approach to business mergers have endorsed a shift from a criminal to a civil law solution. Moreover, the complex nature of the factors associated with merger activities which impinge on the public interest and the substantial amount of expertise required to assess them in deriving a balanced view have been recognized. Both studies have agreed that a review agency should be given power to consider and rule upon whether a particular merger is or is not in the public interest on the basis of specified factors. In addition, it has been agreed that a merger which manifested negative competitive features could be allowed to proceed either conditionally or unconditionally, if there were overriding advantages to the public in the form of economies of scale in production and distribution.

Bill C-256, while following the general lines of the Council's recommendations on mergers, contained a number of features which were not well received. It contained a registration requirement to which objection was taken. More generally, it was contested that it left the Tribunal with too much discretion and would have encompassed more mergers than necessary.

The proposals in the present Bill reject the principle of registration and they reduce the discretion available to the Board. The criteria which are established for the assessment of mergers ensure that the number of mergers which the Competition Policy Advocate can bring before the Board will be relatively small. Those mergers which are identified by this selection process will be submitted to the Board for review in the light of a series of criteria which are specified in the Bill. As a result of the review, the Board may make orders which prohibit or dissolve the merger, allow it to continue subject to defined conditions, or refuse to make an order.

In the Bill, a merger means the acquisition or establishment of an interest in the business of another person, whether competitor, supplier, customer or otherwise. It is subject to review when it is likely to substantially lessen competition. Where the merging of competitors is involved they must have a combined share exceeding twenty per cent of the market before the merger can be reviewed.

When the Competition Policy Advocate, after extensive analysis, concludes that a merger qualifies for review he may make an application to the Competition Board for an order to dissolve the merger. The Board is then required to notify each party to the merger of the impending review and give them the opportunity to appear at a public hearing where they may listen to the case of the Competition Policy Advocate and present their own in a judicial setting.

The Board would be instructed by the proposed Bill to take into account a series of economic factors whenever it looked at an application to prevent or dissolve a merger. These factors relate to: the nature and extent of innovation; the availability of substitutes and imports; the likelihood that a merger will stimulate competition;

differences in the size of the merged enterprise and its competitors; the likelihood that sources of supply or sales outlets would be foreclosed; and the trend in concentration among producers, suppliers and purchasers. They also include consideration of whether the merger would increase barriers to entry of new competitors and whether the parties to the merger intended to dominate the market. Moreover, the Board would consider whether, in the absence of the merger, an acquired firm would have been a vigorous competitor or whether it was about to fail. In addition, consideration would be given to whether, in the absence of the proposed merger, the acquiring firm could have entered the market in a manner less restrictive of competition. Finally, any history of growth by merger or of anti-competitive behaviour by the parties could be examined by the Board.

After hearing the representations of all interested parties, the Board could dispose of the case in a variety of ways. It could prohibit the parties from merging or direct them to dissolve the merger if it has already been effected. The Board could decline to make an order of prohibition or dissolution on condition that action be taken to reduce or eliminate customs duties or other trade barriers, or to dispose of part of the business, or that some other action irreversible by the parties be taken which would, in the opinion of the Board, prevent competition from being lessened substantially. Where the merger or proposed merger would not result in a monopoly or virtual monopoly, the Board would not be permitted under the statute to issue a prohibition or dissolution order if it were satisfied by the parties to the merger that a merger would bring about substantial gains in efficiency not otherwise obtainable. However, where such market conditions are likely to occur, the Board would be empowered to require, as a condition of refusing to order dissolution, that there be a reduction in customs duties or other trade barriers or an irreversible action that would serve to restore competition.

The procedure proposed in the Stage II Bill to deal with mergers would not apply to acquisitions effected before the date on which the section enters into force. It should also be noted that no distinction is made in the legislation between conglomerate and other types of mergers. Cross subsidization and reciprocal buying are practices which could serve to open conglomerate mergers to review by the Board where they create a near monopoly position. Nonetheless, the basic requirement that actual or potential competition must be likely to be lessened substantially before the Advocate can apply for an order, would normally preclude consideration of most such mergers. The economic problems arising from this kind of merger are presently being considered by the Royal Commission on Corporate Concentration.

The Bill clarifies the position of the Competition Policy Advocate and the Act in respect of mergers which fall within the purview of the Foreign Investment Review Act. The Foreign Investment Review Agency must send to the Competition Policy Advocate copies of all merger notifications which it receives. Also, nothing done under the Foreign Investment Review Act is to affect decisions of the Competition Policy Advocate to start inquiries or the determination of any subsequent proceedings under the Competition Act.

2. Monopolization and Joint Monopolization

Monopoly power cannot be equated with bigness. Rather, it is the size of a seller relative to that of the market that is critical and the seller's ability, whether actual or potential, to use this power to influence market prices and conditions of supply. This commonly involves an ability to influence the behaviour of existing rivals in the market and to block the entry of new competition. These markets may assume local, national or world dimensions and vary significantly in terms of their economic significance. The conditions which permit

the exercise of monopoly power therein are quite numerous and varied. These conditions may derive from technological and organizational economies, control of scarce resources or marketing outlets, customer identification with the firm or product, cartel arrangements, or government imposed market restrictions. While bigness may be a factor since it may well bestow significant market power, the tendency to equate monopoly with absolute bigness is misleading. Competition policy is not only concerned with the existence and use of monopoly power, but also with its creation and propagation.

Part V of the Combines Investigation Act contains a general criminal prohibition against being a party or privy to a monopoly. A monopoly is defined in the Act as a situation where one or more persons substantially control in any area of Canada the class of business in which they are engaged and have operated or are likely to operate that business to the detriment of the public, whether consumers, producers or others. It is not a monopoly under the Act merely when rights are exercised under the Patent Act or some other law.

There are, in addition, other offences in Part V dealing with behaviour made possible by the possession of monopoly power. Examples of these are the predatory practices clauses in section 34(1)(b) and (c), which prohibit charging lower prices in one area of Canada than elsewhere and charging prices unreasonably low to eliminate competitors or to substantially lessen competition. When such practices can be easily defined, and when they are clearly detrimental to the public, they can be isolated and forbidden outright with penal consequences.

On the other hand, there are practices engaged in by enterprises possessing monopoly power, in a greater or lesser degree, which may or may not involve public detriment depending upon all relevant circumstances. These include practices covered by

the provisions added to the Act in Stage I as Part IV.1, whereby the Commission was accorded responsibility for examining the competitive implications of refusals to sell, consignment selling, and certain other practices. The Commission was granted power to issue corrective orders where they appeared to be required in these situations to remedy adverse market effects.

The Economic Council of Canada did not propose a method of dealing with monopoly as such. However, it would have given wide powers to its proposed Competitive Practices Tribunal to review and correct a series of restrictive trade practices which are encountered in dominant enterprises.

The Minister's Advisory Committee recommended that the Director have powers to bring instances of alleged misuse of dominant market positions before the board. After a judicial inquiry, the Board would be able to issue an order prohibiting the continuance of such conduct and specifying any other requirement necessary to overcome its effect on the market. If the abuse were repeated after an order had been made, the board would be able to recommend that tariff reductions be effected by the Minister of Finance or order divestiture of prescribed assets.

The promotion of adaptability and flexibility in the economy form the primary objectives of the measures proposed in the Stage II Bill to deal with monopolization. It seeks to do this by applying the general principle that the creation, entrenchment or extension of a dominant position, by measures which primarily involve the use of market power rather than superior economic performance, should be prevented. The civil procedure proposed in the Stage II Bill to deal with monopolization is consistent with the fundamental approach of both the Economic Council and the Advisory Committee. Moreover, it specifies in the statute the types of abuse with which the Board should concern itself.

The term "monopoly" would be defined as a situation in which one or more affiliated persons substantially control the business in which they are engaged in any area of Canada. In order to provide a realistic standard for dealing with practices associated with monopolization, the Bill specifies that a monopoly may be found to exist even when the parties control less than half of a market for a product.

Under these proposals, the Competition Policy Advocate would make an application to the Board for an order when someone was creating, entrenching or extending a monopoly by any of the following means: restricting entry into a market; foreclosing to a competitor sources of supply or sales outlets; eliminating a competitor by narrowing the margin between the competitor's cost and prices; directly or indirectly coercing or disciplining or otherwise restraining economic activity. After affording all concerned a reasonable opportunity to be heard, the Board would be empowered to make an order prohibiting such behaviour, or requiring prescribed action to correct the adverse competitive effects thereof, and when no lesser remedy would be sufficient, dissolving the business or divesting it of assets. The Board could not make an order if entry into a market or growth therein were restricted by, or if sales or supply outlets were foreclosed merely as a result, of superior economic performance.

In addition, the Bill contains a separate section whereby the Board, upon application by the Competition Policy Advocate, will review instances of joint monopolization. The provisions of the section are very similar to the one on monopolization.

Joint monopolization is defined as a situation where a small number of persons, not all of whom are affiliated, achieve substantial control throughout Canada or any area thereof, of a class

or species of business in which they are engaged by adopting closely parallel policies or closely matching conduct, with anti-competitive effects similar to those specified in the monopoly section. Joint monopolization may be found notwithstanding that the parallel policy or matching conduct is based on nothing more than a mutual recognition of interdependence and that there was no agreement or arrangement between or among the parties. The remedies available to the Board are the same as with respect to monopolization.

3. Intellectual and Industrial Property

It is common ground in the reports of the Economic Council and the Minister's Advisory Committee on Stage II that monopoly rights conferred by statute may be abused by their owner if used to support policies restricting competition beyond the degree of restriction conferred by the pertinent statutes. For example, the owner of a patent to manufacture and sell his invention on an exclusive basis may use it to the detriment of the public if he makes the sale of his patented article conditional upon its sale in combination with an unpatented product or products. Similarly, the owner of a trademark may force distributors to accept a complete line of products as a condition of supply of one or more desired products. Obviously, there are other ways in which patents, trademarks, copyrights and industrial designs may be exploited to restrict competition beyond the rights conferred by statute.

The possibility that patents and trademarks may be misused is already recognized in the Combines Investigation Act inasmuch as, in section 29, the Federal Court is empowered to issue corrective orders when the proprietary rights associated therewith are used to prevent or lessen competition unduly. Under this provision, the Attorney General of Canada may apply for an order by laying an information. The issue of such corrective orders

requires the Crown to prove that the exclusive rights conferred by a patent or trademark have been used to prevent or lessen unduly competition in the production, distribution or transportation of an article covered by the patent or trademark. The language used is very similar to that in section 32 which outlaws collusive arrangements.

Section 29 not only requires onerous proof of abuse of patents and trademarks, but fails to cover copyrights and industrial designs. These last two exclusive privileges are both capable of being used to effect anti-competitive conduct. As a result, the provisions of the Competition Act with respect to intellectual property need to be broadened if effective public control is to be exercised over the use of the statutory monopoly rights conferred by law.

In its Report on Intellectual and Industrial Property,* the Economic Council of Canada recommended that the intellectual and industrial property legislation contain a clear statement defining the limits of rights exercisable by the owners of such property. In addition, it suggested that where the existence of unjustifiable anti-competitive practices is proven, competition policy legislation should override that of intellectual and industrial property by providing for the imposition of remedies which lead to the discontinuance of the uncompetitive practices related to ownership of rights in patents, trade marks, copyright and industrial design.

The Minister's Advisory Committee expressed the view that the Combines Investigation Act should accept as given the private rights conferred

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* Economic Council of Canada, Report on Intellectual and Industrial Property (Ottawa: Information Canada, 1971).

expressly, or by necessary implication, in the intellectual and industrial property statutes. In their turn, these latter statutes should express public policy concerning the bundle of rights and limitations that together define patents, trademarks, industrial designs or copyrights. The mere exercise of the general right of ownership derived from the relevant acts should not attract any penalty. However, if the exercise of the rights occurs in a context that creates a special exclusionary or anti-competitive effect, then the general remedies under the Combines Investigation Act should be available.

After careful study, it was decided to lay relatively more emphasis in the present Bill on the recommendations of the Economic Council than those of the Advisory Committee. The Council not only had the benefit of its work on the Interim Report on Competition Policy of 1969, but also the additional study necessary to the preparation of its 1971 Report on Intellectual and Industrial Property. Something more than the general provisions of the competition legislation is required in order to clarify the interface between that legislation and the statutory rights of owners of intellectual property. Moreover, in view of the limited Canadian jurisprudence in this sphere of competition policy, it appears that a general statement on the undesirability of extending or entrenching statutory monopoly rights offers the best start for the development of such jurisprudence.

The present Bill repeals section 29 as it relates to patents and trademarks and provides that the Board, upon application by the Competition Policy Advocate, may review instances of anti-competitive use of patents, trademarks, copyrights or registered industrial designs. The Board, after affording the parties a reasonable opportunity to be heard, may issue a remedial order where it finds that anyone, by exercising any right or interest in a patent, etc. in a manner not expressly authorized

by the enactment conferring the right or interest, is likely to affect competition adversely in a market. The orders which the Board may issue in such cases are all specified in the Bill. They include voidance or declaring unenforceable all or part of a licencing arrangment, directing the granting of a licence or, where no lesser remedy will suffice revoking the intellectual or industrial property right.

4. Interlocking Management

Inquiries under the Combines Investigation Act have disclosed interlockings between the boards of directors of companies later convicted by the courts of being parties to agreements to lessen competition unduly. When a person is a director or officer of two or more companies having a significant share of a market for a particular product or group of products, there is a danger that the person will only be able to reconcile potential conflicts of fiduciary responsibilities to each set of shareholders by seeking to co-ordinate the policies of the companies, whereas public policy requires that these companies compete with each other. Except in the case of banks, there is at present nothing in law to prevent such situations from arising. The Bank Act prohibits any chartered bank director from sitting on the Board of a second bank, a Quebec savings bank, or a trust or loan company.

Although the Minister's Advisory Committee thought that existing evidence does not justify legislation of general application to deal with this situation, the Economic Council recommended that the Tribunal be allowed to examine developments which brought firms under a significant measure of centralized management control.

The Stage II Bill proposes that the Competition Policy Advocate may bring situations involving interlocking managements which carry negative

competition policy implications before the Competition Board. In turn, the Board would be able to prohibit a person who is a director or officer of two or more unaffiliated companies from having such a relationship with one or more companies as provided in the order. It will only be possible to issue such orders when the Board finds that competition in the production or supply of an article in or to any market is or is likely to be substantially lessened by reason of the interlock or that sources of supply or outlets for sales are or are likely to be foreclosed to competitors.

5. Specialization Agreements

Under section 32 of the Combines Investigation Act it is an indictable offence to engage in an agreement or conspiracy to prevent or lessen competition unduly. Arguments to the effect that the results of the agreement are beneficial to the public because of reduced costs arising from the attainment of real economies of scale or improvements in methods of production due to specialization do not, at present, constitute a defence against the charge. As a result, it is not possible under existing law for all or most of the firms of an industry to enter into agreements whereby the different lines of production are allocated among them. There is a case for allowing such arrangements under carefully guarded conditions. It emerges from the undoubted fact that some Canadian industries consist of just a few large plants, each producing a wide range of products in insufficient quantity to maximize economies of large scale production. This situation gives rise to inefficiencies in the procurement of supplies, less than optimal production runs and the underutilization of both human and capital resources. The intent of the provision on specialization agreements in the Stage II Bill is to provide an avenue whereby such real benefits to the general public may be achieved while retaining the prohibition on those agreements which are arranged

merely to enhance the interests of the parties thereto as a result of restriction of the supply of a product.

The Stage II Bill exempts specialization agreements which have been approved and registered by the Competition Board from the ban on collusive arrangements in section 32 of the Act and from the provision for review of exclusive dealing in section 31.4. Application to the Board for an exemption would be made by a party to the proposed agreement. In doing so, the Bill follows the conditions advocated by the Minister's Advisory Committee whereby approval of applications will be made contingent on the likelihood that greater efficiency will result from increased concentration of production of particular lines of a product and upon the absence of pressure upon any firm to join the agreement.

The Bill defines a specialization agreement, essentially as one in which each party agrees to discontinue producing an article on condition that each other party to the agreement agrees to discontinue producing an article, and includes such an agreement in which the parties also agree to buy exclusively from each other the articles that are subject to the agreement. In the gaining of approval for such agreements it must be demonstrated that there exists a likelihood that substantial gains in efficiency of production or marketing will be achieved and that these gains could not be attained by less restrictive means. It must also be established that the arrangements do not involve coercing anyone to become a party thereto. It is not necessary that the members should cease selling any articles they no longer produce or that they not be allowed to purchase these from fellow members on an exclusive basis. The Competition Policy Advocate has the opportunity to appear and make representations to the Board during the course of public hearings regarding these specialization agreements.

The Board, after reviewing a specialization agreement, may decline to approve it, may approve it unconditionally for a period not exceeding five years, or may grant a conditional approval. The Board may require that its approval take effect only after tariff or other trade barriers have been reduced or after some other act irreversible by the parties to the agreement has occurred. The Board may also make its approval conditional upon tariff reductions to be phased over a period not exceeding ten years, in which case the specialization agreement can take effect for the same period of time. Consequential amendments to the Customs Tariff are proposed to provide the Governor in Council, upon the recommendation of the Minister of Finance, with the authority to make the necessary tariff changes.

Where the agreement has the effect of creating a monopoly or virtual monopoly, the Board must make its approval subject to a reduction in customs duties, divestiture of assets, or some irreversible act that would prevent competition from being lessened substantially.

Provisions are included to permit cancellation of such an agreement if the Competition Policy Advocate, in public hearings, shows that it is no longer a valid specialization scheme or that the conditions set out by the Board have not been met. Similarly, parties to the agreement may apply for its modification and the Board may approve it as long as it does not prolong the life of the agreement beyond a five year total. This time limitation, however, may be increased to a maximum of ten years if an order in council has been issued effecting a reduction in tariffs over a period of up to ten years.

6. Price Differentiation

The purpose of competition policy provisions relating to price differentiation or discrimination in sales is to prevent otherwise efficient enterprises with relatively little bargaining power from

being placed at an unnecessary cost disadvantage. Such cost disadvantages emerge when competitors of these smaller firms are favoured by suppliers with price concessions which are unrelated to any cost advantage involved in supplying them with the product or products. The difficulty associated with the formulation or prohibitions dealing with such price differentiation is that the prohibition carries the risk of generating reduced efficiency. This last result may occur when the prohibition discourages the general erosion of prices which emerges from negotiations between powerful buyers and sellers.

The Combines Investigation Act covers price discrimination in two sections. Section 34(1)(a) makes it an indictable offence to sell to a purchaser at preferential prices which are not made available to competitors of the purchaser on sales of like quantity and quality. Section 35 makes it an indictable offence to grant promotional allowances to a purchaser that is not offered on proportionate terms to a competitor of the purchaser.

Section 34(1)(a) has quite limited application because small buyers who are usually the victims of price discrimination do not normally buy in the same quantities as their larger rivals. On the other hand, simply to eliminate the requirement in the section that sales be of like quantity would tend to prevent sellers from passing along to large buyers the actual cost savings of supplying in larger quantities.

The Economic Council recommended that the price discrimination provision cease to be criminal law and instead be reviewable by the Tribunal, chiefly in the light of whether or not the practice lessened competition in particular instances. Following this line of reasoning, Bill C-256 would have repealed the criminal section and provided for a civil review. The Tribunal would have been empowered to prohibit or modify such a scheme, except

in specified circumstances. These circumstances, reflecting situations in which discrimination might be conducive to competitive behaviour, were set out in detail in the Bill. A cost justification test was included, but it applied only to cost savings in delivery. There was no provision to permit the meeting of equally low prices of competitors.

The proposals in Bill C-256 concerning price discrimination were severly criticized by many business interests who submitted briefs on the subject. Many organizations suggested that broader cost justifications should be incorporated in the Bill. In this regard, most submissions asserted that cost economies which were not related to delivery were the most important basis upon which quantity discounts were justifiable, whereas the Bill omitted such a provision. A number of submissions also objected to the omission of functional discounts while some urged that functional discounts be made an alternative to volume discounts. A few critics also insisted that provision be made to allow firms to match discriminatory prices of competitors.

The Advisory Committee stressed the danger of price discrimination legislation preventing competition from eroding price structures in those industries dominated by large buyers and sellers. The committee proposed repeal of the criminal prohibition in section 34(1)(a) and proposed civil review to deal with price discrimination based upon the abuse of monopoly power. It suggested that the Board be authorized to prohibit a seller from granting or a buyer from inducing prices below "reasonably anticipated long-run average costs of production and distribution". Such costs estimates would include "any prospective economies that will reasonably and probably result from the planned adoption of a changed scale of operations, from the introduction of planned changes in technology, from changes in the organization or operation of the firm, and like matters, but it does not include any

such economies that are merely of a speculative nature". The Board's order could contain any other requirement that it considered necessary to overcome the effects of price discrimination or restore or stimulate competition. However, in recognition of the difficulties inherent in administering such a provision, the Committee further stated that "if for whatever reason, these proposals are not considered acceptable, our only alternative suggestion is to leave the price discrimination legislation as it now stands".* The Committee advocated incorporation of the defence of meeting a competitor's equally low price even if the latter were itself discriminatory. There was no discussion of the possibility of combining civil and criminal approaches.

The Stage II Bill proposes that the criminal prohibition of price discrimination in section 34(1)(a) be retained with some slight amendments and that a new civil provision be added. The proposed changes in section 34(1)(a) are described in the next part of this chapter.

Whereas section 34(1)(a) deals with sales of like quantity, the civil provision would deal with sales of unlike quantity. The Board, upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard could issue remedial orders in respect of "price differentiation".

Price differentiation may occur where the Board finds that any supplier is engaging in a practice of supplying an article to different customers who are in competition with each other at different prices based on different quantities purchased by them from the supplier.

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* Skeoch-McDonald, op. cit., p. 224.

The Board may only prohibit price differentiation where the supplier is a major supplier in the market or is in a market where the practice is widespread. Moreover, the Board must first find that the practice has impeded, or is likely to impede, substantially, the expansion of an efficient firm or a firm that, but for the practice, would be a strong competitor. However, no order can be made if price differentials are shown to be based upon a reasonable assessment of actual or anticipated cost. Third parties likely to be substantially affected by reason of any order of the Board must be accorded a reasonable opportunity to be heard before a decision can be reached.

The approach incorporated in the present Bill is intended to be responsive to the criticism levelled by businessmen at the corresponding proposals in Bill C-256 while at the same time promoting the ends of competition and efficiency as advocated by the Economic Council and the Advisory Committee. The Board would not be empowered to issue an order in any instance in which price differentials were based upon a reasonable assessment of the costs of production, distribution, and delivery. This appears to be as close as legislation can practically accommodate the recommendations posed by the Advisory Committee. In those situations where provision is made for orders by the Board relating to price differentiation the statutory criteria are designed to inhibit the destructive use of price discrimination by a dominant supplier or suppliers. The criminal provisions will remain in effect and continue to provide guidance to the business community in respect of sales of like quantity.

7. Foreign Conspiracies

Bill C-2 provided in section 31.6(1)(b) for review by the Restrictive Trade Practices Commission of instances of the implementation of

instructions from abroad to give effect to conspiracies entered into outside Canada. A similar criminal offence was also created by section 32.1(1). No action can be taken under the criminal section while proceedings are under way under this civil section.

The present Bill strengthens the civil provision in section 31.6(1)(b). At present the conspiracy must have been entered into outside Canada and it must be of a kind which, had it been entered into within Canada, would have been an offence under section 32 as unduly lessening competition.

The Bill removes the restriction that the conspiracy must have been entered into outside Canada. In addition it relieves the Board of the requirement to find that the conspiracy would have been in violation of section 32. Instead, the Board is required to find that the conspiracy has or is likely to have an adverse effect on competition, on prices, on quantity or quality of production or on distribution of a product, or on conditions of entry into a trade, industry or profession.

8. Import and Export Restrictions by Affiliated Companies

A business practice sometimes employed by enterprises with affiliates both in Canada and abroad is, by agreement, arrangement or direction within the enterprise, to restrict Canadian imports or exports. Such arrangements are presumably rational in terms of profit maximization for the enterprise as a whole, and in some instances may also be in Canada's interest. For example, a plant may be erected in Canada for a limited purpose as part of a plan for specialization within the multinational enterprise. In other instances, however, restrictions on imports or exports may represent a form of international price discrimination and may simply constitute private tariff barriers to international trade and detract from rather than add to Canadian industrial efficiency.

The Bill proposes that the Competition Policy Advocate may apply to the Competition Board for a remedial order where a corporation carrying on business in Canada has agreed with or received instructions from an affiliate abroad to substantially restrict imports or exports. The Board must find that the restriction is designed to protect the price level in a Canadian market from import competition or to protect a foreign market from Canadian price competition. Also, it may not issue an order if it is satisfied that the corporation does not account for twenty-five per cent or more of Canadian production or supply.

E. Offences in Relation to Competition

1. Monopolization

Monopoly is now defined in section 2 of the Combines Investigation Act and is made a criminal offence in section 33.

The record of successful prosecutions under the section is small, and a number of the cases involved unsuccessful merger prosecutions as well. The one conviction which was sustained on appeal and did not result from a plea of guilty was Eddy Match* in 1953. Nevertheless, there have been other cases in which guilty pleas were registered, and the judgments in some of the cases which were lost by the Crown contain some helpful individual findings upon which to build. In sum, the section has clearly been of value in deterring extreme cases of abuse of monopoly power, and future judgments could well increase its value.

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* Rex v. Eddy Match Company Ltd. et. al. (1953) 13 C.R. 217; 104 C.C.C. 39; 17 C.P.R. 17 (Trial); Eddy Match Company Ltd. et. al. v. The Queen (1954) 18 C.R. 357; 109 C.C.C. 1; 20 C.P.R. 107 (Appeal).

With those considerations in mind, the present Bill retains the existing criminal offence of monopoly in amended form but with substantially the same coverage as now. The proposed new section is not inconsistent with the existing jurisprudence on monopoly and should assist in the orderly development of such jurisprudence.

The Bill transfers the definition of monopoly from section 2 to section 33, which is the offence section. The test of illegality continues to be operation of a monopoly to the detriment or against the public interest, but the words "by any means" are added. Also, the new section makes it clear that, in considering a monopoly case, the courts shall not exclude from consideration evidence merely because it constitutes evidence of an offence under another section. Finally, the Bill stipulates that no proceedings under the section may be commenced where proceedings under the civil provision on monopolization are underway.

2. Price Discrimination and Predatory Pricing

Situations concerning price differentiation will be dealt with under the proposed civil law provision. Predatory pricing, when it involves dominant firms, as it often does, will be reviewable under the civil sections relating to monopolization.

In addition, the existing criminal offences of price discrimination and predatory pricing in subsections 34(1)(a), (b) and (c) are to be retained. The prohibition of predatory pricing in section 34(1)(b) is unchanged. Section 34(1)(a) on price discrimination is amended in minor ways, as is subsection 34(1)(c).

The criminal prohibition against price discrimination has been in the Combines Investigation Act for over forty years. It was adopted to deal with the situation disclosed by the Royal Commission on

Price Spreads in 1935. The issue was that large mail order houses and department stores allegedly took unfair advantage of small manufacturers by forcing them to supply exclusively to them and/or to sell them their products at unduly advantageous prices. These conditions were enforced by threat of withdrawal of the highly prized business these giants could offer. At approximately the same time, the United States adopted a provision containing substantially the same language as the Canadian law to deal with this type of situation. In neither country has it been possible to enforce the section because of difficulties attributable to the language in which the provisions are couched. In Canada there has been a number of clarifying amendments to the section, but to date there has never been a conviction under it. Nevertheless, many qualified observers believe that it has been effective in guiding businessmen to a reasonable solution for dealing fairly with their customers on quantity discount and price-structure problems.

The present subsection on price discrimination provides that when a sale is made to a purchaser, the same prices and terms should as a practice be available to all other competitors of that buyer in respect of sales of products of the same quality and quantity. With slight amendments in the Stage II Bill, the prohibition will continue and violation thereof would remain on an indictable offence. One amendment specifies that when comparing two sales, not only the same quantity and quality will have to be demonstrated, but also substantially the same terms and conditions of delivery. It is made to accommodate the representations which have been made by some sellers who have thought that the existing provisions did not permit the reduction of prices to those buyers who co-operated with the sellers to reduce the costs of delivery. Another amendment makes it clear that the provision is available for the protection of buyers who group together in order to obtain the advantages of buying in larger quantities. Finally, the subsection is amended to make it clear that it applies to

an offer for sale as well as to a completed sale. As is presently the case, the prohibition will not apply to co-operative associations, credit unions, caisse populaires or credit societies when the net surplus from their operations distributed to members, suppliers or customers is in proportion to the acquisition or supply of articles by or from these parties.

Subsection 34(1)(c) makes it an indictable offence to engage in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect. The only change proposed is to replace the word "unreasonably" by "abnormally" and to remove the words "or eliminating a competitor". There has been no jurisprudence in respect of the subsection, but it is believed that the courts would have less difficulty with the new wording.

3. Systematic Delivered Pricing

Experience under the Combines Investigation Act has shown us that in industries dominated by a few large firms, a system of price leadership may develop, often following an earlier period in which there existed overt price agreement. In such instances, it is not uncommon for a tacit agreement upon prices to exist and for all terms and conditions of sale, including freight charges to be equalized in some manner. Identical price structures are also found in competitive industries of similar structure because overt price competition leads to downward pressure on margins which good managers seek to avoid. In the case of oligopolies which function competitively it is often found that the companies engage in periodic bursts of price competition or that secret price reductions below list are made or that freight is absorbed in an unsystematic way in order to increase or maintain individual shares of the total market. When there is an actual or tacit price-fixing agreement, however, it is rare for either direct or indirect

price competition to break out, and when it does it results from a breakdown of confidence which is usually restored by secret intervention and a revival of faith among the participants. The expected consequences of collusive oligopoly therefore are monopolistic prices and output such as result from a successful price fixing conspiracy among competitors.

Differences in the cost of transportation arising from competitors being located at varying distances from their customers can be a source of competitive advantage for those customers attempting to minimize their costs as one way of achieving efficiency. It can be the source of substantial savings in the case of heavy industrial products. However, it is in these heavy industries where systematic freight absorption is most common, and where the basic price lists of the industry members tend to be most uniform. In the cement industry, for example, prices over a wide area may be subject to a basing point system subscribed to by all of the suppliers. Thus a buyer would pay the same for freight on a delivery from any source.

It is clear from the foregoing example that the total cost of freight, which must be paid in some way, tends to be higher in the presence of freight absorption. Buyers are not under pressure to buy from the closest source, and their decisions respecting the locations of their plants may not reflect the real transport cost situations. However, some degree of freight absorption does offer offsetting economic advantages provided the freight absorption is not an integral part of a price fixing arrangement. The practice permits a seller to compete in a larger market area than otherwise, and this has the effect of increasing the number of competing firms in a market, thereby adding to the downward pressure on prices. The Skeoch-McDonald Report expressed concern, not about freight absorption in itself, but with the tight oligopolistic co-ordination with which it may be associated and to which it may contribute.

In a country of Canada's large size and limited population, and especially since competition policy is designed to promote economies of scale even when this results in industries of small numbers, it is particularly important to loosen rigid price structures, to promote the most economic location of both primary and secondary industry, to avoid discriminatory pricing and to encourage the use of the most economical form of transport.

Accordingly, the present Bill proposes the enactment of a section which makes it an offence for a supplier of an article to refuse an established customer the right to take delivery at any location where that supplier makes delivery to any other customer and upon the same terms and conditions of sale and delivery as if the first mentioned customer were located at that point.

Some critics of a similar proposed section in Bill C-256 incorrectly interpreted the meaning of that provision. They interpreted the section as meaning that all existing industry systems of freight absorbtion would be prohibited. That is not the case, nor is it the intention. Rather, it will make it more difficult for an oligopolistic industry selling a bulky product to arrive at a freight absorption formula having the effect of removing freight charges as a source of any price differences among the sellers. Such a rigid formula will be more difficult to maintain because a buyer will have the right to take delivery at more than one point and make his own transport arrangements.

It was also contended that the provision would force suppliers to take on customers with whom they did not wish to deal. As stated above, the provision would apply only to those customers who had already been accepted as such by the supplier in question. Some claimed that a manufacturer had the right to set his own pricing policy. However, this proposal is advanced on the grounds that it is in the public interest to require that the right of

independent action be circumscribed whenever it is necessary to guard against schemes to reinforce price uniformity among competitors or anti-competitive price differentiation among the customers of any supplier.

4. Export Agreements

Agreements to allow competitors to co-operate in export trade have been specifically exempted from the prohibition of collusion in the Combines Investigation Act since 1960 when subsections (4) and (5) of section 32 were passed to encourage manufacturers to expand their export trade and, thereby, their production. Subsection (4) exempts agreements which relate only to exports. Subsection (5) removes the exemption if: the agreement reduces the volume of exports; is likely to injure the business of a domestic competitor; prevents someone else from exporting from Canada; or unduly lessens competition at home.

There has been considerable dissatisfaction expressed in certain business circles with the existing export exemption as a result of the feeling that the exemption is too narrowly defined for practical application. It is also felt by many businessmen that even when considerable benefits from export agreements are demonstrated, it may still be argued that the domestic market or a participant therein has been adversely affected so as to make the agreement an offence against the Combines Investigation Act.

The present Bill attempts to meet the problem by providing a broader exemption for export agreements than that which is presently in effect rather than providing for review of these arrangements by the Competition Board. The proposed amendment will repeal old subsection 32(4) and replace it with one which continues to relate to products but which will also encompass financial activities outside Canada as well as other services which are performed and paid for abroad. Subsection (5) will

also be repealed and replaced by a subsection which will make the exemption invalid if it reduces the value rather than the volume of exports. It retains the other existing criteria for disqualification and adds a further clause to disqualify an agreement if it is contrary to any agreement between Canada and another country. Finally, to meet the practical objections of businessmen, a new subsection will be added specifying that an export agreement having an incidental but unintended effect upon domestic prices would not be disqualified for that reason alone.

5. Import and Export Conspiracies

One way in which enterprises acting in their own general interest may conduct themselves in a manner detrimental to the public interest of Canada is for them to become parties to private international agreements which apportion markets among their members. These arrangements may leave the determination of prices and output directed at the domestic market to the forces of domestic competition, although there may be restrictions on imports. While section 32 of the Combines Investigation Act already prohibits agreements to lessen competition unduly in the Canadian market whether the participants are at home or abroad, there would be considerable difficulty of proof in respect of a cartel agreement in which price-fixing was not a factor.

The Stage II Bill would make it an offence for one or more persons in Canada to agree with one or more persons abroad to restrict exports or imports of a product or otherwise adversely affect competition in Canada. It would be a defence to such a charge if the court were satisfied that the accused did not account for fifty per cent or more of Canadian production or supply. The section will not apply to agreements authorized by Parliament. Unlike in subsection 32(1), the Crown will not be required to prove undue lessening of competition.

The effect of the section will be the provision of a stronger prohibition of private international cartels than is to be found in subsection 32(1) relating to collusive arrangements.

6. Foreign Directives

Section 32.1 of the present Act (which will be renumbered 32.11) makes it a criminal offence for a company to implement in Canada an instruction from abroad which is for the purpose of giving effect to a conspiracy entered into outside Canada that, if entered into inside Canada, would be in violation of section 32. It is the criminal counterpart of subsection 31.6(1)(b) which provides for review by the Restrictive Trade Practices Commission of a similar practice and the issuance of remedial orders. It is proposed in the Stage II Bill to strengthen subsection 31.6(1)(b), as described above under the heading of Foreign Conspiracies.

It is also proposed to strengthen section 32.11. The section would apply to conspiracies wherever entered into rather than only to those entered into outside Canada, and the definition of what constitutes a conspiracy for purposes of the section is clarified.

F. Class and Substitute Actions

Stage I legislation for the first time created a statutory civil right of action for recovery of damages arising from violations of the Combines Investigation Act, whether offences against the prohibitions in Part V or failure to comply with an order of the courts or of the Restrictive Trade Practices Commission. It is recognized, however, that only in situations involving large sums of money would suits normally be brought under this section. Those whose damages are small would not individually bring suit because their individual recoveries would be small and they would be bound to incur legal fees and costs of a prohibitive size

if they were to lose. Accordingly, successive ministers of Consumer and Corporate Affairs have publicly expressed interest in the introduction of a procedure for class actions which would permit consumers and others to sue collectively and economically for recovery of damages suffered as the result of violations of the Act. When the Commons Committee was examining the Stage I legislation and the same issue was raised. The then Minister, the Honourable André Ouellet said he would give the proposal consideration in Stage II. Arrangements were then made for Professor Neil J. Williams of Osgoode Hall Law School at York University to look into the matter from the legal standpoint and for Jennifer Whybrow of the Research Branch of the Bureau of Competition Policy to study it in terms of economics.* While recognizing the existence of certain difficult problems - some substantive and some of a technical legal nature - both reports concluded that class actions could be expected to serve a useful purpose. The problems referred to would be the subject of suitable safeguards written into the legislation.

The following general description of class actions appears at p. 21 of Professor Williams' study:

> "A class action brings together for a single determination the claims of a number of persons against the same defendant that essentially raise an identical question. What justifies a class action is the interest of all in having the same question determined against the defendant. What secures this result is the binding quality of the class action judgment. Whatever the outcome, judgment in a class action on the common question

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* Supra, p. 4.

> binds not only the immediate parties, the plaintiff and the defendant, but also those whom the plaintiff represents, the members of the class. The class action is therefore a convenient substitute for numerous separate actions brought against the defendant by individual members of the class, each action raising the same question. The procedure saves time for the courts and spares the parties the trouble and expense of repeated litigation on an identical issue. Also, since judgment in an ordinary action binds only the actual parties, there is always a possibility that if the same question is raised again in separate proceedings between different parties another court will reach the opposite conclusion. The class action, however, is an exception to the general rule as to the binding effect of a judgment. Judgment in a class action binds the class members as fully and effectively as if they had brought actions themselves, and thus avoids the risk that different courts will make inconsistent findings."

The class action has had a long legal history. It was originally introduced in England towards the end of the 17th century in order to save the time of the courts when the same defendant was being sued by a number of persons on the same set of facts, and also to save the defendant the costs of multiple actions. In the common law provinces of Canada the procedure is governed by substantially similar rules of a court, which in the case of Ontario provides that "when there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all." In Canada, however, the courts have refused to allow cases to proceed as class actions whenever they involved damages or arose out of different contracts or transactions each of which had to be

given individual consideration. This is one of the technical legal problems referred to above, which is overcome by writing special provisions into the present Bill.

The rationale for class actions today does not so much stress the saving of court time and the sparing of defendants the bother and expense of multiple actions (although these are important economies where a multitude of actions would, in fact, otherwise proceed) as it does the provision of opportunity for redress by small individuals who have been injured. Professor Williams' study, at page 30, deals with the question as follows:

> "This perspective of the class action reflects a concern that individuals in society who do not command economic power and wealth need measures to protect themselves against exploitation by those who do. The class action is an instrument by which the economically disadvantaged, consumers, tenants, small businessmen and others, can secure collective redress in the courts for injury, actual or threatened, inflicted by government or industry. At times the stake of just one individual is not sufficiently substantial to warrant a separate action. It is not worth the trouble to sue, particularly if proof is difficult for then the plaintiff will run the risk of liability for costs should the action fail. There is greater justification for litigating, however, when many individual claimants are in virtually an identical position and the adjudication of one claim will decide the claims of all. What would perhaps be impracticable and unrealistic for an individual to prove just for himself becomes worthwhile if compensation can be obtained for hundreds and possibly thousands of people. A favourable judgment in a class action has this result.

> If the question common to all the claims is difficult to prove, the collection of claims under the class action umbrella may not make the task any easier, but the prospect of recovery for numerous persons at least makes the action defensible economically."

The ideal result of a class action would be that each injured party would be compensated in full for the damages he sustained. In practice, however, there will always be occasions when members of the class do not associate themselves with the action or do not apply for compensation when awarded, either because the stake is too small, or because of ignorance or for other reasons. However, the report favours the imposition of liability for the damages to the class as a whole when it can be calculated with reasonable accuracy even when substantial numbers of the class cannot be located or otherwise do not claim. The principle here is that the state, acting for the class, may be awarded the total damages due to the class and thus prevent the defendant from profiting financially from his unlawful conduct.

The recommendations of the reports have been largely adopted in the Bill. A new Part V.1 would be added to the Act to provide for class and substitute actions and the procedure in relation to them. A substitute action, which is described below, would be launched by the Competition Policy Advocate in prescribed circumstances in place of a class action. Initially, it would vest the Federal Court with sole jurisdiction to deal with such actions under the Competition Act. However, upon the conclusion of the necessary agreements with the Attorneys General of the provinces, the Superior Courts of the provinces would also be empowered by proclamation to deal with such cases.

Under the proposed procedure, suit could be brought by a member or members of a class of persons who are numerous and who have a cause of

action for damages against someone on common questions of law and fact. Such a person (or persons) would be entitled to commence an action on his own behalf and on behalf of the whole of his class providing he could fairly and adequately protect its interests. He would have to apply to the Court for an order permitting him to maintain his action as a class action and the order would be issued if the Court was satisfied that the action was taken in good faith, appeared to have merit and also if the class action was superior to other available methods of procedure for the fair and efficient adjudication of the dispute. A two-year time limitation is set for the commencement of such actions, the time being related to the date of the infraction or the termination of consequent legal proceedings, whichever would be the later. This procedure is included as a safeguard against frivolous actions, recognized as a danger if the legislation were drafted in too permissive a manner. The safeguard is strengthened by the fact that the costs of the action may be assessed against the would-be class representative if the Court refuses to allow him to proceed. It is further strengthened by a provision which requires court approval before an action can be discontinued or compromised.

On the other hand, the possibility of a successful outcome to class actions or their counterparts - substitute actions - would be enhanced by a provision introduced in Stage I legislation on civil suits and now made applicable to all Part V.1 actions. Under this section the court record in prior proceedings for a violation of the Act would be admissible in evidence as prima facie proof of the violation and its effect upon the plaintiff.

In making its decision on whether the class action may proceed the Bill would require the court to consider whether there are common questions of law and fact which predominate over questions affecting only individual members. The court will

also consider whether a sufficient number of persons may have suffered significant damage to warrant the cost of administering relief. However, the Court could not refuse an order only because the relief claimed is damages, because the damages would require individual calculations or because the relief claimed arises out of separate contracts or transactions. As intimated above, the effect of these provisions will be to remove the roadblock to class actions which presently is embedded in Canadian jurisprudence. Further to facilitate this change, another subsection would require the Court to include its reasons and conclusions on these matters in any order refusing continuance.

An order that the action may continue as a class action would have to define the class, describe the claim and the relief asked for as well as the common questions of fact and law and set a date before which members of the class could exclude themselves from the action. The Court may direct that notice be given to class members and exclude those who make the request by the date specified. In this event, the judgment would not affect the excluded members. This provision is, of course, designed for the protection of class members who prefer to exercise their rights independently.

When the trial court makes a finding against a defendant, it will give judgment in respect of any claim for loss or damage for each member of the class, and may grant any other remedy or relief applied for which is within its competence. The court may also determine the amount of compensation for each member of the class, or it may order that compensation be determined in accordance with rules of court regulations issued under the Act.

Under the new proposals, the Competition Policy Advocate would be authorized in specified circumstances to commence a substitute action on behalf of a class. The court must first have refused an application for a class action only on

the grounds a class action was not the best recourse because of an insufficient number of persons who may have suffered a significant quantum of loss to warrant the cost of administering the relief. The Competition Policy Advocate cannot obtain judgment where there was a previous criminal conviction in respect of the conduct at issue.

Under the foregoing circumstances, the Competition Policy Advocate may commence a substitute action in respect of the same class and same conduct alleged in the original suit. A time limitation of two years, as for class actions, is provided but an extra period of up to six months is allowed where necessary to give the Competition Policy Advocate time to start proceedings after the refusal of the court to grant an application for a class action.

The Court may direct that notice be given to class members of the bringing of a class or substitute action and a date be specified before which they may write in and have the Court order their exclusion. On this date the individual right to sue of any member who had not claimed exclusion would be extinguished and subsequent judgment would be binding on all class members. Judgment for the Competition Policy Advocate in a substitute action would result in the total liability being awarded to him for payment to the Consolidated Revenue Fund. This would prevent the unjust enrichment of the defendant.

Under the proposals no costs would be awarded to any party except upon an application to maintain a class action, when the rights of individual members were adjudicated upon following judgment for the plaintiff, upon interlocutory motion and in proceedings based upon conduct in respect of which the defendant had been convicted or an order had been made against him by the Competition Board. The purpose of this provision is to reduce the barrier to the commencement of actions which arises from fear of financial risk, while at the same

time, discouraging frivolous actions. The class member with a relatively small claim for damages would be deterred from bringing a class action if he had to assume the risk of losing the suit and having to pay costs to the defendant, as well as his legal fees. Where a judgment is in favour of the class, reasonable costs of the action as determined by the court will constitute a first charge on the amount ordered to be paid as compensation.

The decision to propose the withholding of costs from a successful defendant was made reluctantly, as indeed were the recommendations to do so in the reports. However, without this condition it is not likely that many would take the risk of starting a class action. Moreover, safeguards written into the Act should assure that this provision would rarely, if ever, cause real injustice to defendants.

Additional clauses of the Bill provide for the issuance by the Governor in Council of regulations providing for such things as the efficient administration of class and substitute action procedures, and the determination of the right of individual class members following the determination of the main action affecting the class as a whole.

An accompanying change would amend section 31.1, the civil liability section which was introduced in the Stage I legislation. This would permit civil suits by individuals not only for damages, but also for any other remedy within the jurisdiction of the Court to grant, such as an injunction.

CHAPTER IV

Preamble and Summary of the Provisions of the Stage II Bill, The Competition Act

The Bill contains a preamble which states the purposes of the legislation as revised:

> WHEREAS a central purpose of Canadian public policy is to promote the national interest and the interest of individual Canadians by providing an economic environment that is conducive to the efficient allocation and utilization of society's resources, stimulates innovation in technology and organization, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner;
>
> AND WHEREAS one of the basic conditions requisite to the achievement of that purpose is the creation and maintenance of a flexible, adaptable and dynamic Canadian economy that will facilitate the movement of talents and resources in response to market incentives, reduce or remove barriers to such mobililty, except where such barriers may be inherent in economies of scale or in the achievement of other savings of resources, and that will protect freedom of economic opportunity and choice by discouraging unnecessary concentration, the predatory exercise of economic power and by reducing the need for detailed public regulation of economic activity;

AND WHEREAS the effective functioning of such a market economy may only be ensured through the recognition and encouragement of the role of competition in the Canadian economy as a matter of national policy by means of the enactment of general laws of general application throughout Canada and by the administration of such laws in a consistent and uniform manner;...

Administrative Provisions

The Competition Policy Advocate

The present office of Director of Investigation and Research under the Combines Investigation Act will become the Competition Policy Advocate under the Competition Act. In addition to an enlarged Act to administer, the Competition Policy Advocate will have increased responsibilities for intervening before federal regulatory agencies and in the conduct of general or research inquiries.

The Competition Board

The Restrictive Trade Practices Commission will be superseded by the Competition Board whose functions will be almost entirely quasi-judicial in nature. The Board, upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard, will be empowered to issue remedial orders and interim injunctions in respect of an increased number of reviewable practices. The Commission's existing responsibility for providing a Member to preside at oral examinations of witnesses by the Director will be discontinued. Instead, the Board will appoint Hearing Officers for that purpose. Also, unlike the Commission, the Board will not be involved in the preparation of general or research inquiries for submission to the Minister.

The Board will consist of from five to seven permanent members appointed for terms not exceeding ten years. Provision is also made for up to five associate members with appointments of not more than three years. The present Commission consists of four members.

New and Amended Reviewable Practices

The Competition Board, upon application by the Competition Policy Advocate or the parties as the case may be, and after affording the parties an opportunity to be heard, will be empowered to issue remedial orders respecting the following situations and practices.

Foreign Laws and Directives

The existing provision in section 31.6(1)(b) for review by the Board of implementation of instructions from abroad to give effect to conspiracies entered into outside Canada is strengthened. The existing section requires that the instruction be for the purpose of giving effect to a conspiracy which, if entered into inside Canada, would have been in violation of section 32 as unduly lessening competition. The new section will apply when the instruction is to give effect to an arrangement, wherever entered into, which adversely affects competition, prices, quantity or quality of production, distribution of a product or conditions of entry into a trade, industry or profession. The companion criminal prohibition in existing section 32.1 will also be strengthened.

Restriction of Importation or Exportation

The Board will be empowered to issue a remedial order when it finds that a corporation carrying on business in Canada has agreed with or received instructions from an affiliate abroad to substantially restrict imports or exports with the

object of protecting price levels in Canada or abroad, unless the Board is satisfied that the corporation accounts for less than twenty-five per cent of production or supply in Canada.

Mergers

The criminal prohibition of mergers is to be repealed and replaced by a civil provision. Subject to detailed criteria the Board may prohibit or order dissolution of a merger that lessens or is likely to lessen, substantially, actual or potential competition. However, in the case of a horizontal merger, unless it results in a combined share exceeding twenty per cent of any market, the merger is not subject to review. In cases where it has jurisdiction, the Board will not prohibit a merger where there is a high probability that it will bring about substantial gains in productive or marketing efficiency not reasonably attainable by other means. Under specified conditions, the Board may provide that an order prohibiting a merger shall not take effect if trade barriers are reduced or some other act irreversible by the parties to the merger occurs.

Monopolization and Joint Monopolization

The Board will be empowered to issue remedial orders when it finds that anyone has sought or is seeking to create or entrench a monopoly by behaviour having or likely to have specified anti-competitive effects. Monopoly is defined basically as substantial control throughout Canada or any area thereof by one person or affiliated persons of a class or species of business. The Board may find substantial control where less than fifty per cent of a market is involved. The remedial orders may relate to the offensive practices or, where no lesser remedy will suffice, the Board may order divestiture. The Board may not issue an order where the exclusionary effect of behaviour complained of, solely reflects superior efficiency or superior economic performance.

A separate section endows the Board with broadly similar powers with respect to joint monopolization. Joint monopolization is defined as a situation where a small number of persons, not all of whom are affiliated, achieve substantial control throughout Canada or any area thereof, of a class or species of business in which they are engaged by adopting closely parallel policies or closely matching conduct having specified anti-competitive effects.

The existing criminal offence of monopoly in section 33 is to be retained in amended form but without substantial change in scope. Evidence that another section of the Act has been violated may be introduced as evidence in a prosecution for monopoly. No proceedings may be commenced under section 33 where the civil provision on monopolization has been invoked on substantially the same facts.

Intellectual and Industrial Property Rights

The Board will be empowered to issue remedial orders where it finds that the exercise of a right in a patent, trademark, copyright or registered industrial design in a manner not expressly authorized by the statute conferring the right is likely to affect competition adversely. Existing section 29 relating to the use of patents or trade marks to restrain trade is to be repealed.

Interlocking Management

The Board will be empowered to prohibit a director or officer of a corporation from being a director or officer of another corporation where it finds that competition is likely to be thereby substantially lessened or that sources of supply or outlets for sales are or are likely to be thereby foreclosed.

Specialization Agreements

Specialization agreements which have been approved by the Board will be exempted from the prohibition of collusive arrangements in section 32 and from section 31.4 as it applies to exclusive dealing for the period during which the Board's approval is in effect.

A specialization agreement is defined as an agreement in which each party thereto agrees to discontinue producing an article in the production of which he is engaged at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article in the production of which he is engaged at the time the agreement is entered into, and includes such an agreement in which the parties also agree to buy exclusively from each other the articles that are the subject of the agreement.

The Board may approve such agreements subject to certain conditions, notably that they are likely to bring about substantial gains in efficiency. In some circumstances the Board may, and in some circumstances shall make its approval contingent upon the government reducing trade barriers or upon some other act irreversible by the parties to the agreement.

Agreements will normally be approved for periods up to five years but they may be approved for periods up to ten years when accompanied by phased tariff reductions.

Price Differentiation

Provision is made whereby the practice of price differentiation by a supplier may be prohibited by the Board under specified conditions. Price differentiation is defined as a practice of supplying an article to different customers who are

in competition with each other at different prices based on different quantities purchased by them from the supplier.

Before issuing an order the Board must find that:

- the supplier is a major supplier in a market or is one of the suppliers in the market where the practice is widespread;

- the practice has impeded, or is likely to impede, substantially, the expansion of an efficient firm, or a firm that, but for the practice, would be a strong competitor.

No order may be made where the Board is satisfied by the supplier that the price differentiation is based on a reasonable assessment of the difference in the actual or anticipated cost of supplying customers in different quantities and under different terms and conditions of delivery.

Section 34 of the existing Act, which outlaws price discrimination and predatory pricing, is retained with some clarifying amendments. It deals with price discrimination in sales of like quantity to purchasers who are competing with one another.

New and Amended Prohibitions

Export Agreements

The existing exemption of export agreements from the prohibition of collusive arrangements under section 32 is to be broadened in a number of respects:

- the exemption will apply even where the agreement has an adverse effect on prices in the domestic market, if such effect is unintended and is ancillary to the primary objectives of the agreement;

- the provision that such agreements must not reduce or limit the volume of exports has been changed to require that they not limit the value of exports;

- the exemption is extended to specified financial activities and services performed outside Canada.

A provision is to be added to provide that the exemption shall not apply to an agreement which is contrary to any agreement into which Canada has entered with any other country relating to private restrictions on international trade.

Import and Export Conspiracies

The Bill would make it a criminal offence for anyone in Canada to agree with one or more unaffiliated persons abroad to restrict exports or imports of a product or otherwise affect competition adversely in Canada. It would be a defence to such a charge if the Court was satisfied that the accused in Canada did not account for fifty per cent or more of Canadian production or supply. Agreements authorized by Parliament and those between affiliated companies are exempted.

Systematic Delivered Pricing

It will be an offence for a supplier of an article to refuse a customer the right to take delivery at any location where the supplier makes delivery to other customers. Subject to that additional constraint, the legal status of basing point systems and other forms of freight absorption is unchanged.

Class and Substitute Actions

Provision will be made for class actions on behalf of classes of persons who have suffered loss or damage as a result of conduct which is contrary

to any prohibition in Part V of the Act or failure to comply with an order of the Board or a court under the Act. Where a class action is not the best recourse for reasons specified in the Bill, the Competition Policy Advocate will be empowered to launch a substitute action on behalf of the class, with damages being paid to the Crown.

Other Substantive Amendments

Proceedings of the Board

The following changes are proposed to apply to proceedings of the Board in respect of both existing and new reviewable matters:

The Competition Policy Advocate must make a *prima facie* case before a member of the Board before he may apply to the Board for a remedial order.

The Board, in addition to affording an opportunity to be heard for the applicant for an order and the person against whom the order is sought, may afford a similar opportunity to other persons whose business is likely to be substantially affected.

The Attorney General of a province may intervene on behalf of the province in any application before the Board.

The Board shall make its orders in terms which, while achieving this purpose, will interfere to the least possible extent with the rights of persons affected.

Banks

Responsibilities now vested in the Inspector General of Banks for application of certain aspects of competition policy to banks are to be transferred to the Competition Policy Advocate by repeal

of sections 102.1 and 138 of the Bank Act and consequential insertions in the Competition Act. Enforcement will come completely under the Competition Policy Advocate with two exceptions. One is agreements approved by the Minister of Finance for purposes of monetary or fiscal policy and the other is mergers among banks certified by the Minister of Finance as desirable in the interest of the stability of the financial system.

Regulated Conduct

The degree of public regulation required to qualify an activity for exemption from the Act is to be defined so that:

> The conduct must be expressly required or authorized by a public agency not appointed by the regulated persons.
>
> The regulatory agency must regulate expressly in a manner set out in the regulatory statute.
>
> The application of the Competition Act would seriously interfere with the attainment of the primary objectives of the regulatory law.

Federal regulatory agencies will be required to achieve their statutory objectives in a manner that is least restrictive of competition where consistent with their statutory objectives.

The Competition Policy Advocate's powers of intervention before federal regulatory agencies will be extended to include the rights to examine all evidence and witnesses and appeal a decision reached by the agency.

General Inquiries

The Board is to be relieved of all responsibilities in respect of general or research inquiries which the Commission now has under section 47. The Competition Policy Advocate will submit his report on such inquiries to the Minister. The Minister may, upon his own initiative or upon application by persons compelled to provide information for the inquiry, appoint a commissioner to reopen the inquiry. The final reports of all inquiries shall be published.

International Agreements

The Minister, with the approval of the Governor in Council will be authorized to enter into international agreements for the elimination of private restrictions on international trade and assistance in the administration and enforcement of competition laws.

Additional Remedies

Interim Injunction by the Board

The Board, upon application by the Competition Policy Advocate and after affording parties a reasonable opportunity to be heard, will be empowered to issue interim injunctions in respect of practices reviewable by the Board where serious injury to competition or a person's business is threatened.

Prohibition Orders by the Courts

In respect of a prosecution under Part V, at any stage of a prosecution before conviction and with the consent of the Attorney General by or on behalf of whom the proceedings were taken and of the accused, the court will be empowered to dismiss the prosecution and make an order of prohibition or, in the case of a monopoly, of dissolution.

Supplementary Remedies in Private Suits

In addition to recovery of damages in private suits as now provided, a court will be empowered to grant any other remedy or relief which, by reason of its general jurisdiction, it has authority to grant. These provisions will apply to class and substitute actions as well.

Evidentiary Provisions

The following changes in the evidentiary provisions are to be made:

The existing provision for seizure of books, papers, records or other documents in the course of an inquiry will be extended to seizure of things.

Procedure is laid down for determination whether a claimed solicitor-client privilege applies in respect to documents about to be seized by the Competition Policy Advocate.

Provision is made whereby the Competition Policy Advocate, in examining documentary and other evidence on business premises, may retrieve information stored in computer data banks.

The period of time for return of seized documents is extended from 40 to 60 days, and conditions are specified for return of things.

The provision for confidentiality of information and evidence obtained by the Competition Policy Advocate is strengthened and clarified.

CHAPTER V

A Clause by Clause Description of the Stage II Bill

Clause 1:

Clause 1 repeals the present long title of the Act which is An Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers. That title goes back to the first Combines Investigation Act of 1910. At the time, it contained a definition of a "combine" which included, not only combinations in restraint of trade, but also mergers, trusts and monopolies. The noun "combine" is not defined in the present Act, although the verb "combines" and the noun "combination" are found in section 32 relating to combinations in restraint of trade. The word "trust" has not appeared anywhere in the Act since 1960 except in the long title.

The proposed title, "An Act to Provide for the General Regulation of Trade and Commerce by Promoting Competition and the Integrity of the Market Place and to Establish a Competition Board and the Office of Competition Policy Advocate" more accurately describes the purpose and contents of the Act. Prior amendments have extended the scope of the Act which are reflected in the proposed new title. It encompasses the present Director's role in appearing at hearings of regulatory agencies and the provisions in the Act for the promotion of honesty and fair dealing in the market place.

The clause, for the first time, introduces a Preamble to the Act which places the maintenance of competition in the context of national economic and social goals.

Clause 2:

The short title, Combines Investigation Act, is repealed and replaced by Competition Act. The new title complements the amendment to the long title effected by clause 1.

Clause 3:

This clause amends section 2 of the Act by introducing new definitions into the legislation of "Board" and "Competition Policy Advocate"; by repealing the definitions "Commission", "Director", "Merger", and, "Monopoly"; and by expanding the definition of "Corporation".

"Board" refers to the Competition Board. In subsection 16(1), this body supersedes the Restrictive Trade Practices Commission and, like its predecessor, would be a Court of Record empowered to issue orders directed towards remedying the anti-competitive effects of specified business practices and situations.

"Competition Policy Advocate" replaces the Director of Investigation and Research as the principal administrative officer of the Act. He would be appointed by the Governor in Council under subsection 5(1).

The definition of "Corporation" has been expanded to include a company and any other corporate body wherever and however incorporated. This is in conformity with other legislation.

Sub-clause 3(3) repeals the definition of "merger" in section 2 of the present Act. Merger is re-defined in section 31.71.

Sub-clause 3(4) repeals the definition of "monopoly" in section 2 of the present Act. Monopoly is defined in sections 31.72 and 33.

Clause 4:

The present subsection 4(1) exempts collective bargaining activities from the purview of the Act. Clause 4 expands the exemption in subsection 4(1)(c) relating to employers to include collective bargaining with workmen as well as with employees. That makes it consistent with subsection 4(1)(a) which exempts the collective bargaining activities of workmen and employees. The subsection is also extended to exempt employers in collective bargaining, not only in respect of salary, wages and terms and conditions of employment as now, but also in respect of other remuneration and terms or conditions of employment or engagement. These amendments are intended to meet concern which has been expressed that associations of employers, of such persons as entertainers, might not be covered by the existing exemption.

Subsection 4(2) presently provides that no exemption is granted when an employer agrees with another person to withhold any product from anyone or refrain from acquiring any product. With the addition of the word "selectively" the amendment clarifies that subsection 4(2) is directed to a selective boycott and not to a lock-out.

Clause 5:

Although section 4.3 is new to the Competition Act, provisions having the same force and effect as section 4.3 exist in section 102.1 and section 138 of the Bank Act. The repeal of sections 102.1 and 138 of the Bank Act, by clause 40, completes the transfer to the Competition Policy Advocate of responsibility for the application of competition policy to banks, with two exceptions which are specified in subsection 4.3(1) of clause 5.

The first exception, in subsection 4.3(1)(a)(vi), is agreements or arrangements which the Minister of Finance certifies to the Competition

Policy Advocate that he has approved for purposes of monetary or fiscal policy. The other exception, in subsection 4.3(1)(b), is a merger between or among banks which the Minister of Finance certifies to the Competition Policy Advocate that he has approved in the interest of the stability of the financial system.

The remainder of subsection 4.3(1) defines certain arrangements among banks which were either not prohibited by the Bank Act or which were specifically exempted by section 102.1 of the Bank Act, and which will be exempted from the Competition Act as it applies to mergers and joint ventures (s. 31.71) and conspiracies (s. 32).

However, subsection 4.3(2) provides that the exemptions other than the two requiring approval by the Minister of Finance do not apply to agreements or arrangements lessening competition unduly in respect of such matters as prices, production, markets, distribution or entry into a business. Subsection 4.4 introduces a new exemption. Specialization agreements, as defined by section 31.76 in clause 26, are exempted from section 32 and from section 31.4 as it relates to exclusive dealing while the agreements are approved by the Board.

Clause 5 introduces section 4.5 which exempts regulated conduct from the application of Part IV.1 (matters reviewable by the Board) and specified Part V offences, and defines "public agency" and "regulated conduct". The thrust of the section is to confine the exemption to regulated conduct which is expressly required by a public agency acting under powers specifically granted to it by legislation.

At present the Act contains no directions as to the kinds of regulation which qualify for exemption and under what circumstances. The courts have had to decide these issues on a case by case basis in the light of whichever section of the Act was at

issue. The situation has never been entirely clear and has become less so with the introduction of practices which are reviewable by the Commission and the proliferation of regulatory schemes.

Subsection 4.5(1), by specifying the sections of the Act to which the exemption applies, defines the kinds of conduct which are at issue. The exemption applies to all anti-competitive conduct which is either prohibited or reviewable under the Act. It does not apply to offences relating to misleading advertising or other unfair or dishonest marketing practices.

Subsection 4.5(2), defines "Public Agency" and "Regulated Conduct". In effect, to qualify for exemption, conduct must be regulated by a "public agency" which derives its power directly or indirectly from federal or provincial legislation. The "regulated conduct" must be expressly required or authorized by a public agency not appointed by those whom it regulates, the public agency must be expressly empowered to regulate as it does and it must have expressly directed its attention to the regulation of the conduct. Finally, regulated conduct is only exempted where the application of the Competition Act to it would seriously interfere with the primary regulatory objectives.

Subsection 4.6(1) in clause 5 places a new requirement upon federal agencies which are authorized to regulate conduct in respect of prices, conditions of entry, mergers or output. It requires them to exercise their powers to achieve their authorized objectives and, where alternative means are available, to achieve these objectives in the manner least restrictive of competition. Subsection 4.6(2) provides that only the Competition Policy Advocate may appeal a decision of a regulatory agency on the grounds of subsection 4.6(1) in a case where he has intervened in the matter pursuant to section 27.1. (Section 27.1 in clause 18 provides the Competition Policy Advocate with the

right to appeal decisions of federal regulatory agencies in matters in respect of which he has intervened.)

Clause 6:

Section 5 of the Act is amended to provide for the appointment and salary of the Competition Policy Advocate in place of the Director of Investigation and Research. Subsection 5(2) of the Act relating to oath of office is repealed. The latter is covered by the Oath of Office Act and the regulations under it.

Clause 7:

The term "other thing" is inserted by clause 7(1) in subsections 10(1) and 10(2), thereby extending the powers of the Competition Policy Advocate to enter premises to examine, copy or take away any book, paper, record, document or other thing. That will make it clear that he may have access to things such as tapes and samples of products which he may require.

Clause 7(2) repeals subsection 10(4) dealing with return of documents in view of the amendment proposed in clause 14. It also repeals subsection 10(5) dealing with refusal of admission to premises and re-enacts it as subsection 10(4) without substantial amendment.

Clause 8:

Clause 8 lays down, for the first time, the procedure to be followed in dealing with claims of solicitor-client privilege which are made during the course of examination of documents on business premises by representatives of the Competition Policy Advocate. In the past, such claims have occasioned unnecessary difficulties in the absence of prescribed procedure.

Subsection 10.1(1) provides for the immediate sealing of the item at issue and its deposit with a specified court official or with a person acceptable both to the Competition Policy Advocate and the person claiming privilege.

Subsection 10.1(2) provides that a judge of the Federal Court or of a superior court in the jurisdiction in which the document or other thing was found, sitting in camera, may decide the question of privilege on application of either the owner or the person in whose possession the item was found or the Competition Policy Advocate. If no such application is made within ten days from the date on which the item was placed in custody, any judge may, on an ex parte application by or on behalf of the Competition Policy Advocate, order the item to be delivered to the Competition Policy Advocate.

Subsection 10.1(3) endows a judge with the necessary powers to give effect to the procedure prescribed in subsection 10.1(2).

Section 10.2 is entirely new. It provides for the retrieval by the Competition Policy Advocate or his representative of business data stored in a computer and for its admissibility as evidence. Subsection 10.2(1) requires anyone who stores business records in a computer data bank to maintain records of the character of the data and the means of retrieval. Subsection 10.2(2), (3) and (4) empowers the Competition Policy Advocate, in an inquiry, to require a print-out or copy of such data, and make it admissible as evidence. A print-out or other copy of data supplied to the Competition Policy Advocate in response to an order by him shall be deemed, for the purposes of section 45, to have been on the business premises. Subsection 10.2(5) empowers the Competition Policy Advocate to enter any premises where he believes there may be records of computer stored data which is relevant to an inquiry and which must be kept

according to subsection 10.2(1). He may require any person, whether on the premises or not, to apply or cause to be applied, the retrieval procedure. Subsection 10.2(6) empowers the Competition Policy Advocate to examine and copy or take away for further examination or copying computer printouts. Subsection 10.2(7) makes sections 10(2) to (4) relating to entry of premises and section 10.1 relating to claims of privilege applicable to this section.

Clause 9:

The new subsection 11(1) simply adds the category "other things" to books, records or other documents that may be obtained or received by the Competition Policy Advocate or his authorized representatives. This is in conformity with the amendments to subsections 10(1) and 10(2).

Clause 10:

This clause would amend section 13, which now provides for the appointment of counsel to assist the Director or the Commission in inquiries. In new subsection 13(1), reference to the Commission is deleted consequent upon the termination of its role in inquiries resulting from the repeal of sections 18 and 19 by clause 14. The section is also amended to provide for the Competition Policy Advocate's role in respect of federal regulatory agencies by section 27.1, in applying to the Board for interim injunctions under section 29, in launching substitute actions under section 39.14, and in applying to the Board for orders under Part IV.1. Subsection 13(1) provides as now for the appointment of counsel by the Attorney General of Canada.

Clause 11:

This clause, by amending subsection 14(1), deletes the requirements that an inquiry not be discontinued by the Competition Policy Advocate

without the written concurrence of the Commission in any case in which evidence has been brought before the Commission. Its deletion is consequent upon the repeal of section 18 in clause 14 providing for the submission of Statements of Evidence to the Commission.

Clause 12:

This clause repeals the authority for the existence of the Restrictive Trade Practices Commission in section 16 and provides for the establishment of a new board to be known as the "Competition Board", to be appointed by the Governor in Council. Subsection 16(1) provides for the appointment of not more than seven or less than five permanent members and not more than five associate members. By section 16(2) at least one of the permanent members must be a salaried judge under the Judges Act, or a barrister or advocate of at least ten years standing at any provincial bar. By subsection 16(3), one permanent member shall be appointed chairman of the Board and as such he is its chief executive officer.

Subsections 16(4) and (5) provide for the appointment of a vice-chairman and an acting chairman, as in sections 16(2.1) and (2.2) of the present Act.

Subsection 16(6) provides that each permanent member holds office during good behaviour for a term not exceeding ten years. Under subsection 16(7) each associate member holds office during good behaviour for a term not exceeding three years. Subsection 16(8) provides that members must retire upon attaining 70 years of age. Removal for cause is also provided for in subsection 16(8). After the expiration of his appointment or upon attaining 70 years of age, a person may continue to act as a Board member in respect of any matter with which he became involved during his term of office (subsection 16(9)). Subsection 16(10) provides for

the reappointment of members. The appointment of temporary substitute members is provided for by subsection 16(11) where permanent members are temporarily incapacitated.

Section 16.1 complements the preceding section by providing for the remuneration of permanent and associate members of the Board, and for expenses incurred by members in the performance of their duties and for superannuation.

By virtue of section 16.2 three Board members, including at least one permanent member, constitute a quorum.

Section 16.3 authorizes the Board to make rules governing the exercise of its powers, the performance of its duties and the regulation of its proceedings.

Section 16.4 provides that the principal office of the Board shall be in the National Capital Region; however, the Board may conduct its sittings at such places at it may decide.

Section 16.5 provides that the Chairman may designate any three or more members of the Board, including at least one permanent member, to sit as a panel. Secondly, he may designate a member to chair the panel. Any panel may exercise all the powers and perform all of the duties of the Board concerning any matter assigned to it by the Chairman.

Clause 13:

This clause would amend section 17 relating to oral examination of witnesses in consequence of the termination of the direct role of the Board in inquiries.

Subsection 17(1) is amended by clause 13(1) so that a Board member, on his own motion, may not call persons to be examined. As now, a Board member could call persons upon ex parte application of the Competition Policy Advocate, to be examined. However, the person would not be examined before a member of the Board as now. He would be examined by a Hearing Officer who was not a member of the Board but who was named by a member of the Board. The subsection also extends the power to order production to include things, consistent with changes proposed in clause 8 and elsewhere.

Clause 13(2) amends subsection 17(3) so that Board members will no longer be permitted to commence court proceedings to enforce their own orders. The power to enforce orders will be vested in the courts, to be exercised upon application by the Competition Policy Advocate. This relieves the Board of an executive function in inquiries by the Competition Policy Advocate.

Clause 13(2) also amends subsection 17(4) relating to delivery and return of documents. As amended, it is extended to things, the delivery must be forthwith instead of within thirty days, and the part relating to return of documents is repealed. Return of documents is dealt with in clause 14.

Clause 13(3) amends subsection 17(7) so that the Chairman of the Board rather than the Minister as now may issue commissions to take evidence in another country. This is consistent with the Board's function in subsection 17(1) as amended of ordering persons to appear before a hearing officer.

Clause 14:

This clause terminates the direct role of the Board in inquiries by the repeal of sections 18 and 19. Those sections now provide for the submission

of Statements of Evidence by the Director to the Commission, for hearings, consideration and report by the Commission and for publication of the Report by the Minister. In recent years the Director has depended almost entirely upon section 15 of the Act whereby he refers the results of inquiries into suspected offences to the Attorney General of Canada for possible legal action. With regard to general or research inquiries, which by virtue of section 47 are embraced by section 19, new procedures are established by clause 37 which do not involve the Board.

Clause 14 proposes a new section 18 to deal with return of documents and things. Section 18(1) provides substantially as section 17(4) now does for the return of documents or copies within sixty days after coming into the possession of the Competition Policy Advocate. It also replaces existing subsection 10(4) which provides for return of seized documents or copies thereof within forty days.

Subsection 18(2) is entirely new and provides for the return of things other than documents which are delivered to the Competition Policy Advocate pursuant to a subsection 17(1) order or pursuant to section 10 of the Act. The Competition Policy Advocate shall return those "things" within sixty days of their receipt by him, unless they are required for the purpose of a prosecution or other proceedings before a court, or for an application to the Board commenced or made within that time period. If the thing may be required in any future prosecution, proceeding or application, the Competition Policy Advocate may return the thing to the person from whom it came with a direction that he retain it, unaltered, in his possession for such reasonable period of time as is specified in the direction. The amendment requires that the person shall retain it as directed and shall return it whenever requested by the Competition Policy Advocate within the specified time period.

Clause 15:

Subsection 20(1), which provides for representation by counsel of persons under oral examination, is amended consequent upon clause 13(1) whereby persons are to be examined before a hearing officer instead of before a member of the Board.

Subsection 20(2), providing that no person shall be excused from testifying, is amended to provide that he shall not be excused from producing other things as well as documents.

Clause 16:

This clause repeals section 22 dealing with interim reports by the Commission in respect of Statements of Evidence submitted to it by the Director. This is consequent upon the repeal of sections 18 and 19 by clause 14.

Clause 17:

The purpose of clause 17 is to amend the present sections 23 and 24 of the Act which are general sections relating to administrative staff. The object of the section remains the same. "Competition Policy Advocate" replaces "Director", and "Board" replaces "Commission". In section 24(1), provision is made for remuneration of hearing officers appointed under section 17 as amended.

Clause 18:

Subsection 27(1) is amended to provide that all inquiries under the Act shall be in private without exception.* The existing subsection

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* It should be noted that all proceedings before the Board will normally be held in public.

provides an exception which empowers the Chairman to order all or part of an inquiry that is held before the Commission it conducted in public.

Subsection 27(3) is new although it is consistent with the manner in which section 27(1) has been interpreted by the Director. It is designed to provide additional assurance that evidence or information obtained by the Competition Policy Advocate shall remain confidential except for the purposes of this Act. It further provides that information obtained by authorized representatives of the Competition Policy Advocate shall not be disclosed except for the purposes of this Act and with the consent of the Competition Policy Advocate. Subsection 40(2)(b) in clause 34 provides a penalty for violation of subsection 27(3).

Subsection 27(4) is also new. It will provide the Chairman of the Board with more flexibility in respect of privacy or otherwise of evidence or information obtained in proceedings before the Board than is provided by subsection 27(2). It empowers him to order that any portion of evidence obtained not be disclosed except to such persons as he designates. As an example of how section 27(4) might apply, the Board might be prepared to receive certain information in confidence provided the persons to which it related could have access to it.

Clause 18 also proposes substantial extensions to section 27.1 relating to representations by the Competition Policy Advocate to federal regulatory agencies. Whereas subsection 27.1(1) now authorizes the Director to make representations in respect of the maintenance of competition, the Competition Policy Advocate will be authorized to intervene for the purpose of making representations in respect of the maintenance of competition or the efficient allocation and utilization of resources as expressed in the preamble to the Act.

Subsection 27.1(2) is entirely new and further enlarges the role of the Competition Policy Advocate before regulatory agencies. His name shall be entered on the record, he shall have access to all evidence or material, he may call witnesses and cross-examine witnesses called by others, and he shall have all the rights of any party to the matter, including the right of appeal.

Subsection 27.3 is also new. In respect of evidence or material to which he gains access, the Competition Policy Advocate must maintain the same degree of confidentiality as is required of or afforded by the regulatory agency.

Subsection 27.1(4) amends the definition now contained in subsection 27.1(2). The word "agency" replaces "tribunal". The amendment makes it clear that the phrase "federal board, commission or agency" does not include the Governor in Council, the Treasury Board or federally appointed judges while acting as such.

Clause 19:

Section 28 relating to reduction or removal of customs duties is revised quite extensively by clause 19. The section was not changed by the 1975 amendments and it does not adequately reflect the decision making role of the Board.

As the section now stands, the Governor in Council may only reduce tariffs under it if it is satisfied, as a result of an inquiry under the Act or a court judgment that there is a conspiracy, combination, agreement, arrangement, merger or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public.

As revised, section 28 makes it specific that the Governor in Council may take into account a decision of the Board as well as an inquiry or

court judgment. Moreover, it need only be satisfied that competition has been impaired by conduct which is prohibited by the Act or in respect of which the Board may make an order.

Clause 19 repeals section 29 of the Act relating to powers of the Federal Court where patents are used to restrain trade. Instead, provision is made in clause 26 by proposed section 31.74 to empower the Board to issue remedial orders in respect of the anti-competitive exercise of intellectual and industrial property rights.

Clause 19 proposes an entirely new section 29 to provide for the issuance of interim injunctions by the Board. Such an injunction may be issued by the Board pending the commencement or completion of Part IV.1 proceedings where it finds that there is a prima facie case indicating that the party sought to be restrained has engaged, is about to engage, or is likely to engage in conduct which may be remedied by an order of the Board. In granting an injunction the Board must find that serious injury to the business of another person is threatened by the behaviour or intended behaviour of the person who will be restrained.

Subsection 29(2) requires that forty-eight hours notice be given to each party affected by the application for an injunction. However, subsection 29(3) permits the Board to hear an application for an injunction ex parte if the Board is satisfied that subsection 29(2) cannot reasonably be complied with and that the situation is sufficiently urgent that it would be against the public interest to enforce the notice requirements. However, an injunction granted by the Board pursuant to subsection 29(3) may only be in effect for a maximum of ten days.

Under subsection 29(4), the Board is empowered to impose such terms as are necessary and sufficient to meet the circumstances of the case. The

injunction, with the exception of those granted pursuant to an ex parte application, is in effect for such a period of time as is specified by the Board.

Subsection 29(5) complements the above sections by enabling the Board, on proper application, to continue the injunction with or without modification, or to revoke it.

Subsection 29(6) prescribes that when the Competition Policy Advocate has obtained an injunction under this section he is required to expedite the commencement or completion of Part IV.1 proceedings relating to the conduct that precipitated the injunction.

Clause 20:

This clause amends section 29.1 providing for interim injunctions by a court. The amendments to subsection 29.1(1) do not alter the thrust of the provision but modify the requirements which must be met by the applicant. Only a prima facie case must be made. Also, the requirement in subsection 29.1(1)(b) that the injury to competition to a person cannot be remedied by any other section of the Act is repealed. In its place is proposed a requirement that "serious injury to competition or to the business of another person is thereby threatened". Finally, section 29.1(7) relating to punishment for disobedience is repealed in consequence of subclause 36(2). These amendments are consistent with proposed section 29 relating to interim injunctions by the Board.

Clause 21:

This clause proposes a number of amendments to subsection 30(1) which provides for the issuance of prohibition orders by a court where a person has been convicted of an offence under Part V.

Subsection 30(1)(b) is amended to vest authority in the Federal Court of Canada as well as a superior court of a province to correspond with the jurisdiction of that Court in section 30(1)(a) that derives from section 46 of the Act. Also, in addition to prohibiting continuation or repetition of an offence, a court may prohibit a like offence. Finally, in respect of a monopoly offence, it is proposed that, in addition to ordering dissolution, a court be empowered to direct reduction of the degree of monopoly or partial divestiture. All reference to mergers is repealed since an anti-competitive merger will no longer be a criminal offence.

Subsection 30(2) is new. It empowers a court, with the consent of the Attorney General concerned and the accused, to dismiss a prosecution under Part V and issue a prohibition order. It could apply to situations where a prolonged trial was neither in the interests of the public or the accused.

Existing subsection 30(2) becomes subsection 30(3) and is amended to conform to the amendments proposed in subsection 30(1).

Subsection 30(3) becomes subsection 30(4) and is amended to clarify the right of appeal where an order is made by a court of criminal jurisdiction. A new subsection 30(5) is introduced in relation to new subsection 30(4). Subsection 30(4) becomes subsection 30(6) with consequential amendments. Subsection 30(5) becomes subsection 30(7) with technical amendments.

Subsection 30(6) is repealed in consequence of subclause 36(2). Subsection 30(7) becomes subsection 30(8) with consequential amendments.

Subsection 30(8) is repealed because it is spent.

Clause 22:

Subsection 31(2) of the present Act is repealed by clause 22. Penalty provisions are re-enacted by clause 36, as section 46.1.

Clause 23:

Clause 23 amends the present section 31.1 which provides a civil damages remedy to private persons. Subsection 31.1(1) is amended to make it consistent with Part V.1 in clause 33 whereby costs of a class or substitute action are not ordinarily recoverable.

Subsection 31.1(1.1) is new. In private actions, the courts may grant other forms of relief, such as injunctions in lieu of or in addition to awarding damages. Forms of such alternative relief, generally available at civil law, will apply to private actions brought under the Competition Act. Subsection 31.1(1.2) requires that the Competition Policy Advocate receive notice of these proceedings.

Subsection 31.1(2) places a stronger onus on a defendant. The court record in any case where a person was convicted for an offence under Part V, or for failure to comply with an order of the Board is proof in a private action that the defendant had engaged in the prohibited conduct, unless proof rather than evidence to the contrary is submitted. Also, the subsection is amended to apply to class or substitute actions.

Clause 24:

This clause amends section 31.6(1)(b) in two significant respects. First, instead of applying only to agreements entered into outside Canada, it will apply to agreements wherever entered into. Second, whereas the present section requires the Board to find that the agreement would have been in

violation of section 32 if entered into in Canada, i.e., that it would unduly lessen competition, the test in the amended section will be an adverse effect effect on competition, on prices, on quantity or quality of production, or on distribution of a product, or on conditions of entry.

Subsection 31.6(3) is new. It simply confirms that the section, as now, does not apply to agreements among affiliated companies.

Clause 25:

Clause 25 proposes new section 31.61. It will be a reviewable practice for a corporation carrying on business in Canada to implement an agreement or arrangement with, or instruction from, a foreign affiliate to substantially restrict imports or exports in order to protect price levels in Canada or abroad. In such circumstances, the Board, upon application by the Competition Policy Advocate and after affording parties an opportunity to be heard may prohibit implementation of the arrangement. However, it may not make an order if it is satisfied that the corporation does not account for 25 per cent or more of production or supply in Canada.

Clause 26:

This clause expands the quasi-judicial role of the Board by empowering it to review instances brought before it of merger, monopoly, joint monopolization, anti-competitive use of patents, interlocking managements, specialization agreements and price differentiation, and, after affording the parties an opportunity to be heard, to issue remedial orders or, in the case of specialization agreements, orders of approval.

Section 31.71 provides for the review of mergers.

Subsection 31.71(1) defines a merger in language which is very similar to the first part of the present definition in section 2. However, the new definition makes it clear that establishment as well as acquisition of an interest in another person's business is covered. Also, amalgamation is specifically included.

Subsection 31.71(2) defines the application of the section as being to a merger that lessens or is likely to lessen, substantially, actual or potential competition. In the case of a horizontal merger the section makes such a merger reviewable only if the merged parties and their affiliates will control more than twenty per cent of the market. Affiliates are defined in subsection 31.71(12).

Subsection 31.71(3) empowers the Board, upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard, to dissolve a merger to which the section applies or direct that it not proceed.

Subsection 31.71(4) specifies the factors to be considered by the Board in assessing the likely effect of a merger upon competition. Irrespective of its findings in that regard, however, subsection 31.71(5) prohibits the Board from dissolving or disallowing a merger where it is satisfied by the parties that it will bring substantial gains in efficiency not reasonably attainable by other means.

Subsections 31.71(6) and (7) empower the Board to approve a merger conditional upon reductions in trade barriers or some other act irreversible by the parties to the merger. Where a virtual monopoly would result from a merger, the Board must attach such a condition of its approval where such condition would prevent the merger from lessening competition substantially; otherwise, it must prohibit the merger. Clause 42 proposes an amendment

to the Customs Tariff empowering the Governor in Council, on the recommendation of the Minister of Finance, to act in response to such conditional orders by the Board when tariff reductions are involved.

Subsection 31.71(8) provides that in reviewing the effects of a merger upon competition, the Board is not to exclude from consideration any evidence by reason only that such evidence is evidence of an offence under the Act or of conduct which is reviewable under another provision of Part IV. There have been occasions when such evidence has been excluded from consideration by the courts.*

Subsection 31.71(9) requires that the Foreign Investment Review Agency supply copies of all merger notifications to the Competition Policy Advocate which it receives under the Foreign Investment Review Act. Subsection 31.71(10) specifically authorizes the Competition Policy Advocate to inquire into any such merger if he believes it provides grounds for an order of prohibition by the Board. Subsection 31.71(11) makes it clear that nothing done under the Foreign Investment Review Act is to determine any matter under the Competition Act, and decisions made under the Foreign Investment Review Act are inadmissable in proceedings under the Competition Act.

Subsections 31.71(12) and (13) define affiliated corporations and partnerships for purposes of subsection 31.71(2) which defines mergers to which the section applies.

Section 31.72 provides a civil procedure whereby the Board, upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard, may issue

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* For example, in R. v. Canadian Breweries Ltd., supra.

remedial orders in respect of monopolies as defined in the section. It is based on the view that the flexibility of civil procedures is required to restrain monopolization whenever possible without the sacrifice of efficiency. A criminal offence of monopoly with substantially the same thrust as existing section 33 would be retained by clause 30 as a deterrent to extreme instances of monopoly abuse.

Subsection 31.72(1) defines monopoly essentially as substantial control in any area of Canada by one person or affiliated persons. The definition has the effect of excluding shared, or joint, monopoly which is dealt with in section 31.73. Subsection 31.72(5) makes it clear that a market share less than 50 per cent may constitute "substantial control".

Subsection 31.72(2) sets out in considerable detail the kinds of conduct which qualify for a remedial order by the Board. A person must have sought or be seeking to create or entrench a monopoly or to extend monopoly power into another market by specified forms of behaviour. The subsection also specifies the kinds of remedial orders which the Board may issue, and these include, as a last resort, dissolution of the monopoly.

Subsection 31.72(3) prohibits the use of the section concurrent with joint monopolization proceedings under proposed section 31.73 or with a criminal monopoly inquiry under section 33.

Finally, subsection 31.72(4) prohibits the Board from making an order on the sole basis of behaviour that has, or is likely to have the effect of restricting entry into a market, or foreclosing a competitor's sources of supply or outlets, where the party against whom the order is sought satisfies the Board that such effect solely reflects superior efficiency or superior economic performance.

Section 31.73 deals with joint monopolization in a manner which is very similar to the treatment of monopolization in section 31.72, but with certain significant differences. Subsection 31.73(1) defines joint monopolization. As in the case of monopoly, substantial control of a market is required, but by a small number of persons not all of whom are affiliated. Moreover, the persons must achieve the substantial control by adopting closely parallel policies or closely matching conduct having the exclusionary effects on competition which are specified in the subsection. The specified effects on competition are substantially the same as those in subsection 31.72(2) relating to monopolization. The meaning to be attached to joint monopolization is further clarified by subsection 31.73(3); it may exist even though the parallel policies or matching conduct is based on nothing more than a mutual recognition of interdependence without any agreement or arrangement.

Subsection 31.73(4) prohibits the Competition Policy Advocate from initiating action under the civil or criminal monopoly sections while proceedings under the joint monopolization section are under way on the same facts.

Subsection 31.73(2) prescribes the remedies which are available to the Board where, upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard, it finds joint monopolization. The remedies are substantially the same as in monopoly proceedings. In joint monopoly proceedings, the Board may prohibit policies as well as conduct, which is consistent with the definition of joint monopolization. Also, unlike in the case of monopoly, the Board's power "to dissolve the monopoly" would not normally involve divestiture.

Subsection 31.74, orders in respect of patents, etc., is proposed with the consequent repeal of section 29 by clause 19. The thrust of

the section is to make it a reviewable practice for a person to exploit his possession of rights in a patent, trade mark, copyright or industrial design in a manner which goes beyond the rights themselves and which affects competition adversely. For example, the Competition Policy Advocate might apply to the Board for a remedial order in respect of a licensing agreement containing territorial restrictions, grant-back provisions, or cross-licensing arrangements which are not expressly authorized in the patent grant, where such arrangements adversely affected competition. The Board, after affording the parties an opportunity to be heard, could issue specified kinds of remedial orders, all relating to the use or continuing ownership of the rights. The Board would not have the power, which the Federal Court now has under section 29 in respect of patents and trade marks, to direct "that such other things be done or omitted as the court may deem necessary to prevent any such use." Subsection 31.74(2) specifies that no order shall be made which is at variance with any of Canada's international undertakings respecting patents, trade marks, copyrights or industrial designs.

Section 31.75(1) provides for the prohibition by the Board of interlocking management which results in substantial lessening of competition in production or supply of a product or the foreclosing to competitors of sources of supply or sales outlets. Interlocking management exists where a director or officer of one corporation is a director or officer of another corporation. The Board may only act upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard. Subsection 31.75(2) provides that the action does not apply in respect of affiliated companies. "Director" and "officer" are defined in subsection 31.75(3).

Section 31.76, in conjunction with section 4.4 in clause 5, exempts specialization agreements which have been approved by the Board from section

32 relating to conspiracies and section 31.4 as it applies to exclusive dealing, for the period during which the Board's approval is in effect.

Subsection 31.76(1) defines a specialization agreement essentially as one in which some or all the firms in an industry agree individually to discontinue production of an article, and the agreement may include arrangements for the firms to buy the subject articles exclusively from one another. In other words, the definition embraces an agreement in which the firms of an industry seek to increase their efficiency by each specializing on longer runs of a narrower range of products.

Subsection 31.76(2) provides that the application for approval be made to the Board by a party to the proposed agreement, and that the Competition Policy Advocate have an opportunity to be heard. Subject to certain conditions outlined below, the Board may approve the agreement for a period up to five years where it finds that substantial gains in efficiency not attainable by less restrictive means will result, and that no attempts have been made to coerce anyone into the agreement.

Conditional allowances by the Board are provided for in subsections 31.76(3) and (4). The Board may attach specified conditions to its approval where they would prevent adverse effects on competition. The conditions would be reductions in trade barriers or some other act irreversible by the parties. Tariffs may be reduced in stages over a period of up to ten years, in which case the agreement may be approved for a similar period. Subsection 31.76(4) prohibits the Board from approving an agreement which would completely eliminate competition except on conditions similar to those in subsection 31.76(3). Decisions respecting tariffs would remain the responsibility of the Minister of Finance and the Governor in Council. Enabling legislation is proposed in clause 42.

Subsection 31.76(5) provides for review and cancellation of specialization agreements by the Board, for reasons specified in the subsection, upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard.

The parties to the agreement may apply to the Board for an order to modify the agreement (subsection 31.76(6)), or to extend it to a total period of five years where it was originally approved for less (subsection 31.76(7)).

Subsection 31.76(8) requires that a register of specialization agreements and modifications be kept at the principal office of the Board.

Section 31.77, which deals with "price differentiation", would supplement the existing criminal offence of price discrimination in section 34(1)(a) as amended by clause 30. The latter section deals with sales in like quantities to purchasers in competition with one another. Section 31.77 deals with sales in unlike quantities to such purchasers.

The purpose of the section is to provide an avenue of recourse for businessmen, particularly those of small and medium size, who are in difficulty because of unjustifiably large discounts which their larger rivals exact from suppliers. The section seeks to meet that need while still leaving suppliers at liberty to pass along to buyers the savings which are associated with large accounts.

Subsection 31.77(1) provides that the Board, upon application by the Competition Policy Advocate and after affording the parties an opportunity to be heard, may prohibit price differentiation under specified circumstances. The supplier must be supplying customers in competition with one another at different prices based on different quantities purchased. It must be a practice. The supplier must be a major supplier or else be one of the suppliers

in a market where the practice is widespread. The practice must impede substantially the expansion of an efficient firm which would otherwise be a strong competitor.

Subsection 31.77(2) provides in effect that, even if the foregoing conditions are met, the Board may still not issue an order if it is satisfied by the supplier that the practice is based upon "a reasonable assessment of the difference in the actual or anticipated cost of supplying customers in different quantities and under different terms and conditions of delivery."

The two concluding sections of clause 26 propose additional provisions in respect of proceedings before the Board under Part IV.1 of the Act. Any person likely to be substantially affected may be afforded an opportunity to be heard, and the Attorney General of a province may intervene on behalf of the province (section 31.78). And the Board shall make its orders in terms which interfere to the least possible extent with the rights of persons affected (section 31.79).

Clause 27:

Section 31.8, a procedural section is amended by the addition of subsections (1.1), (1.2) and (1.3), to guard against undue formality of proceedings before the Board while still ensuring fairness. While the Board is a Court of Record by virtue of existing subsection 31.8(1), the amendments make clear that it is not to be bound by legal or technical rules of evidence. All hearings shall be dealt with as informally and expeditiously as circumstances and considerations of fairness permit. Evidence which is inadmissible in a court because of any privilege is not admissible before the Board. Subsection 31.8(1.3) provides that the Board may give reasons for its decisions and shall do so if requested by a party to the proceedings.

Section 91.91 is entirely new. The Competition Policy Advocate, before he may apply to the Board for an order under Part IV.1, must first make an ex parte application to a member of the Board and satisfy him that a prima facie case exists. The decision of the member is final. The Board, on an application for an order under Part IV.1 and after affording the parties an opportunity to be heard, may permit any amendment or variation of the application that it considers to be reasonable, including any amendment of the remedies applied for. Also, an order of the Board is not reviewable by a court on the ground that it does not conform with the order that was considered by a member of the Board on application under this section.

Clause 28:

Subsection 32(4), which now exempts agreements relating only to exports from prosecution under section 32(1) is expanded by the addition of three other exemptions, all relating to dealings abroad. Subsections 32(4)(b) and (c) exempt agreements on deposits and loans made outside Canada. Such agreements, when entered into by banks, are now permitted by section 102.1(2) of the Bank Act, which would be repealed by clause 40. Subsection 32(4)(d) which would exempt services performed and paid for outside Canada, would clarify the application of the export exemption to such services as engineering.

Subsection 32(5) is changed in two substantive respects. New subsection 32(5)(a) would have the effect of withdrawing the export exemption where it was contrary to any international agreement on competition matters to which Canada became a party. Subsection 47.1(1) in clause 37 would authorize the Government to enter into such agreements.

Subsection 32(5)(e) would replace existing subsection 32(5)(a) and would remove from the exemption agreements leading to a reduction in the

value, instead of volume as now provided, of exports. This will have the effect of broadening the export exemption.

Subsection 32(5.1), along with subsection 32(5)(e) referred to above, is intended to meet complaints that some businessmen hesitate to enter export agreements for fear that such agreements might have sufficient domestic effects to constitute a violation of section 32(1). The basis for their concern is subsection 32(5)(d) which removes the exemption where the export agreement lessens competition unduly in the domestic market. To meet this concern, subsection 32(5.1) would make it clear that an export agreement is not a violation "only because it has an adverse effect on prices in the domestic market, if such effect is unintended and is ancillary to the primary objectives of the agreement or arrangement."

Clause 29:

Subsection 32.1 in clause 29 is entirely new. Its purpose is to deal more effectively with private international cartels than is possible under section 32(1). It would be an offence under subsections 32.1(1) and (2) for persons carrying on business in Canada to enter conspiracies with persons carrying on business outside Canada to restrict imports or exports or otherwise to adversely affect competition in Canada. Subsection 32.1(3) exempts arrangements specifically authorized by an Act of Parliament and those between affiliates. Subsection 32.1(4) provides a defence where the persons satisfy the Court that they do not account for fifty per cent or more of Canadian production or supply. There is no requirement as in section 32(1) to prove undue lessening of competition in order to obtain a conviction.

Subsection 32.11(1) re-enacts existing subsection 32.1(1) with some amendments. Whereas the existing subsection relates only to conspiracies

entered into outside Canada, the amended version relates to conspiracies wherever entered into. The amendment is similar to one of those proposed for existing subsection 31.6(1)(b) by clause 25.

Clause 30:

Existing section 33 prohibiting mergers and monopolies is repealed and is replaced by a new section 33 which prohibits illegal monopolies. The monopoly offence is amended considerably in form but only marginally in substance. Subsections 33.(1), (2) and (3) define an illegal monopoly in substantially the same way that monopoly is now defined in section 2. Subsection 33(4) creates the offence of illegal monopoly, as compared with the present offence of monopoly, to conform with the changed style of definition. Operation of a monopoly to the detriment of the public will continue to be an offence, but the words "by any means" are added. Subsection 32(5) is new and is intended to make it clear that the courts are not to exclude evidence only because it is evidence of another offence under the Act or of a reviewable matter under Part IV.1. Finally, subsection 32(6) prohibits commencement of proceedings under the section where proceedings on the same facts are under way under the civil provisions respecting monopolization or joint monopolization in clause 26.

Section 34(1)(a) which prohibits price discrimination would be re-enacted in slightly amended form. It is made clear that the prohibition applies to an offer for sale as well as to a sale. Instead of discrimination between "competitors of a purchaser", the section will refer to discrimination by the supplier "between any of his customers who are in competition with each other for a share of the patronage of the same ultimate customers". Also, the wording has been altered to make it clear that the subsection applies to buying groups as well as to individual buyers. Subsection 34(2), a definition section, picks up language which is

deleted from subsection 34(1)(a) and alters it slightly. It carries forward the application of the section to an offer for sale and to buying groups. Also, it adds the stipulation that to be an offence, the discrimination must be between customers to whom sales are made under substantially the same terms and conditions of delivery. Some businessmen have pointed out that differences in prices are sometimes justified by the fact that one customer has receiving or other facilities which permit delivery at substantially lower cost than to another customer.

Subsection 34(1)(c), which deals with predatory pricing, is also amended slightly. Whereas the existing section refers to prices "unreasonably low", the new section refers to prices "abnormally low", and deletes the reference to "eliminating a competitor", leaving what is considered to be the proper test, namely the likely impact on competition.

Clause 31:

This clause adds a new defence against a charge of sale above advertised price under existing section 37.1. Subsection 37.1(3)(d) is added to exempt a sale by a person not in the business of selling the product at issue. Representations have been received that an individual offering something for sale by such means as a classified newspaper advertisement might unwittingly violate the existing section, and that was certainly not the intention.

Clause 32:

The new section 38.1 creates an indictable offence relating to systematic delivered pricing. No supplier shall refuse to sell and deliver to a customer at a locality where he makes delivery to any other customers, on the same terms as would be available to the first customer if he were located

at that point. Subsection 38.1(2) prohibits a supplier from refusing to deal with a new customer by reason only that the customer insists on taking delivery at the same point of supply as another customer. It is to be emphasized that the section does not outlaw delivered pricing. Rather, it seeks to strengthen the bargaining power of buyers who may be faced with a rigid industry-wide system of freight absorption coupled with identical delivered prices from all suppliers to any particular location. The section would enable a buyer to take delivery at a regular delivery point other than where he was located and to pay the same price as if he were located at that point. He could then make his own transport arrangements from there. It is believed that such an option would in some circumstances offer savings to the buyer and would tend to undermine overly rigid pricing systems.

Clause 33:

This clause adds to the Competition Act a new Part V.1 which establishes a class action procedure for bringing private actions for damages and for other relief resulting from conduct contrary to Part V or the failure of any person to comply with an order of the Board or a court under this Act.

Subsection 39.1 defines "class", "class action" and "Court". The Federal Court - Trial Division will initially be the only court with jurisdiction to hear class actions. Subject to subsection 39.23, any superior court may be proclaimed to have concurrent jurisdiction.

Subsection 39.11(1) permits one or more class representatives to commence court proceedings on behalf of all other persons similarly situated for damages and/or other forms of relief available under section 31.1.

Subsection 39.11(2) incorporates into this section the provisions relating to evidence of prior proceedings (subsection 31.1(2)) and time period limitations (subsection 31.1(4)) which are applicable to damage actions under section 31.1.

Subsection 39.12(1) requires the class representative to apply to the Court for an order that the proceedings be maintained as a class action. Notice must be given to the person or persons against whom any remedy is sought, to the Competition Policy Advocate and, if the Court so orders, to other members of the class.

Subsection 39.12(2) lays down the conditions under which the Court shall order proceedings to be maintained as a class action. The members of the class must be numerous, there must be common questions of law or fact, the interests of the class must be fairly and adequately represented, and a prima facie case must be made. Finally, the Court must find that a class action is superior to any other method for the fair and efficient determination of the issues.

Subsection 39.12(3) sets out the criteria which the Court must consider in determining whether a class action is the superior method. One is whether common questions of law or fact predominate over questions only affecting individual members. The other is whether the class includes a sufficient number who are likely to have suffered a significant quantum of loss or damage to warrant the cost of administering relief.

Subsection 39.12(4) directs the Court not to refuse a class action on any of the following grounds:

- the relief claimed is damages;
- the compensation must be calculated on an individual rather than on a class basis; and
- the damage arose from separate transactions.

Subsection 39.12(5) specifies matters which shall be included in an order that proceedings be maintained as a class action. Subsection 39.12(6) requires a Court to state reasons for ordering or refusing to order a class action. Subsection 39.12(7) simply makes it clear that proceedings can only be maintained as a class action if so ordered pursuant to the section. Subsection 39.12(8) provides that such an order is a final judgment of the Court.

Section 39.13 specifies the nature of a judgment in a class action where the Court makes a finding against the defendant. The Court shall give judgment for each member of the class for whom a claim of loss or damage has been made. Also, it may grant any other remedy or relief applied for, by injunction or otherwise, within its authority. Compensation to each member of the class may be determined by the Court, or in accordance with regulations issued under this part of the Act if the Court so orders.

Subsection 39.14(1) provides for "substitute actions" by the Competition Policy Advocate. That official may commence a substitute action in respect of the class where the Court has refused to grant an order on the grounds only that a class action would not be the superior method of adjudication because the class is unmanageable, based on criteria set out in 39.12(3)(b). A case involving a very large class of persons who individually suffered very small losses may fit the requirements for a substitute action.

Subsection 39.14(2) sets time limits on the commencement of such actions which are similar to those for class actions under subsection 39.11(2) and damage actions under section 31.1. However, the Competition Policy Advocate may commence an action within six months of a refusal of a court to order a class action even if that extends the time beyond the two years provided in subsection 31.1(4).

Subsection 39.15(1) provides for the relief of the class where the Court makes a finding against the person against whom the substitute action was commenced, unless that person has been convicted of an offence under the Act on substantially the same facts. Subsection 39.15(a) states that if the Court can determine the minimum damages to the class as a whole and they are substantial, the Court shall award damages in that amount to the Competition Policy Advocate. Subsection 39.15(1)(b) enables the Court to grant any other appropriate relief that is within its authority to grant.

Pursuant to subsection 39.15(2) any amount awarded as damages to the Competition Policy Advocate in a substitute action must be paid into the Consolidated Revenue Fund.

Section 39.16 provides that the Court may order that notice be directed to class members advising them of the proceedings for a class or substitute action which have been commenced on their behalf, and of their right to exclude themselves from the proceedings before a specified date.

Subsection 39.17(1) pertains to the exclusion of members of the class from class or substitute actions. A class member will be excluded if he so informs the Court pursuant to an order under section 39.12 or notice under section 39.16 before the specified date. In a substitute action, if no notice has been given under section 39.16, a class member may notify the Court of his desire to be excluded from the class at any time before judgment is given. The rights of a person so excluded are not affected by the results of the class action.

Under subsection 39.17(2), the defendant in a class action or substitute action brought under the Competition Act may apply to the Court to exclude any member of the class who has started proceedings

for the same cause in any other court. This subsection protects the defendant from the double recovery of damages by individual litigants who are also members of the class.

Section 39.18 provides that the judgment in a class action or substitute action is final and binds the defendant and all members of the class, except those members who were excluded from the class. Judgment is final except to the extent that it leaves the determination of compensation or other issues to subsequent proceedings.

Section 39.19 requires that the Court must approve any proposed withdrawal or compromise of a class action.

A new cost rule is introduced in subsection 39.2(1). It is designed to overcome the financial disincentive to litigation that the current rules present. Generally, no costs will be awarded to either party in a class or substitute action, including an appeal. Exception to this rule has been made, in that costs may be awarded:

a) on an application to the Court for an order that the action be maintained as a class action;

b) on a settlement of any matter mentioned in subsection 39.22(1)(d) which provides for the issuance of regulations prescribing procedures to be followed in settling questions of law or fact that relate to individual members of a class, of the rights of such members and to any relief to which they are entitled, when judgment is given for members of the class.

c) on an interlocutory motion;

d) on proceedings based on substantially the same facts on which the defendant was convicted of an offence against the Act.

If a class action is successful, subsection 39.2(2) provides that reasonable solicitor and client costs constitute a first charge on a *pro rata* basis on the compensation awarded to each class member.

Section 39.21 provides that when judgment has been given for the class members and the judgment has not determined all questions of law and fact, or the amount of damages to be awarded, but leaves these matters to be determined in subsequent proceedings, class members and defendants will have the same rights of discovery as in an ordinary civil action, costs will follow the event, and the defendant will have the right to pay money into Court as has the defendant in an ordinary civil action.

Section 39.22 provides that the Governor in Council may make regulations in respect of specified matters and generally to carry out the purposes of Part V.1.

Regulations shall be published in the *Canada Gazette*. Interested persons shall have the right to make representations. A regulation previously published as a proposal, whether in the same or amended form, does not have to be published a second time (39.22(3)).

Subsection 39.22(4) empowers the judges of the Court to make rules and orders respecting class actions that are not inconsistent with this part.

Section 39.23 enables the Governor in Council to issue a proclamation vesting in the superior courts of original jurisdiction concurrent jurisdiction with the Federal Court - Trial Division. This proclamation will result after there has been consultation and agreement between the Attorney General of Canada and the respective provincial Attorneys General.

Clause 34:

Existing section 40 becomes subsection 40(1) and is amended to include other things in line with section 10 in clause 8.

Subsection 40(2) is new and makes it a summary offence for a person to fail to maintain the required degree of confidentiality as set out in subsection 27(3).

Clause 35:

This clause would amend subsection 46(1) by adding offences under proposed section 38.1 in clause 32 to the offences that may, subject to the consent of the accused if he is a natural person, be tried in the Federal Court.

Subsection 46(4) is also amended to make it clear that consent to the institution of a prosecution in the Federal Court - Trial Division in respect of an offence under Part V or section 46.1 is only required where the prosecution is instituted against the natural person rather than a corporation.

Clause 36:

This amendment would, by the addition of the new subsection 46.1(2), make it an offence to fail to comply with an injunction issued under the new subsection 29(1) set out in clause 19 or under section 29.1 or to fail to comply with an order or requirement made under section 30 or 31. The repeals of the present subsections 29.1(7), 30(6) and 31(2) by clauses 20, 21 and 22 are related to this amendment.

Clause 37:

This clause, by the substitution of a new section 47 for the existing one, relieves the Board of all responsibilities in respect of general or

research inquiries. It establishes new procedures which, while still safeguarding the rights and interests of affected parties, will be more expeditious.

Subsection 47(1) is substantially the same as existing section 47(1) with one exception. It is made clear that regulated conduct may be a subject of a general inquiry.

Subsection 47(2) makes it clear for the first time that evidence or information obtained in the course of other inquiries under section 8 may be used in a general inquiry.

The repeal of existing subsection 47(2) along with the repeal of subsection 17(1) by clause 13 and of sections 18 and 19 by clause 14 relieve the Board of any functions in respect of research inquiries other than the naming of hearings officers under new subsection 17(1).

Subsection 47(3) provides that the Competition Policy Advocate shall submit his report of the inquiry to the Minister rather than to the Commission as now.

Subsections 47(4) to (8) inclusive replaces the present system of hearings and report by the Commission. Under the new procedure, the Competition Policy Advocate shall send copies of his report to all persons in respect of whom he has exercised his powers of inquiry. The Minister, upon his own initiative or upon application by an affected party, may appoint a commissioner to reopen the inquiry. The commissioner, after affording the parties an opportunity to be heard, shall submit a report to the Minister which must be published within 90 days. Failing the appointment of a commissioner, the report of the Competition Policy Advocate shall be published within 120 days after the receipt by the Minister.

Subsections 47(9) and (10) provide for discontinuance of general inquiries by the Competition Policy Advocate and for the review of such a decision by the Minister on his own initiative or upon the request of an interested party.

Clause 37 also proposes the enactment of section 47.1 empowering the Government to enter into international agreements for the elimination of private restrictions on international trade, co-operation in enforcement of competition laws and exchanges of information. Subsection 47.1(2) requires the Minister to ensure the maintenance of confidentiality to the greatest extent possible in such exchanges. In view of the international character of many restrictions on competition which affect Canada, the country stands to benefit by such exchanges.

Clause 38:

The proposed amendment to section 49 would clarify the responsibility of the Minister in relation to the Annual Report of the Competition Policy Advocate when it is received when Parliament is adjourned.

Subsection 50, which is new, makes it clear that the Board is not authorized to make orders in respect of matters not within the legislative authority of Parliament.

Clause 39:

Subclauses 39(1) to (4) would make amendments consequential on the re-establishment of the office of the Director of Investigation and Research as the office of Competition Policy Advocate and on the creation of the Competition Board to supersede the Restrictive Trade Practices Commission. They would also provide for uniform use of the term "corporation" wherever appropriate.

Subclause 39(5) and the Schedule would modify certain of the offence provisions in the Act to assure a greater degree of consistency of form. Specifically, the expressions "not exceeding", "not more than" and "on conviction" have been deleted where their use is superfluous and inconsistent with the wording of other offence provisions of the Act.

Clause 40:

This clause proposes repeal of sections 102.1 and 138 of the Bank Act, completing the transfer to the Competition Policy Advocate of responsibility for the application of nearly all aspects of competition policy to banks. This is explained in connection with clause 5 above.

Clause 41:

Subclause 41(1) would repeal section 114 of the Canada Corporations Act which vests the Restrictive Trade Practices Commission with responsibility for conducting inquiries into the affairs of companies in respect of certain malpractices.

Subclause 41(2) would amend subsection 114.2 (2) of the Canada Corporations Act to refer to the Board rather than the Commission. The subsection authorizes the Board to approve searches of company premises where the company fails to file certain returns required under that Act.

Subclause 41(3) would amend sections 114.3 and 114.4 of the Canada Corporations Act to delete references to section 114, which would be repealed as noted above.

Clause 42:

This clause repeals section 16 of the Customs Tariff. The section, which goes back to 1897, provides for the commissioning of a judge to inquire

into combines. With the development of more specialized investigative machinery under the Combines Investigation Act, the section has been little used and has certainly not been invoked during the past half century.

A new section 16 of the Customs Tariff would be enacted for a different purpose. It would empower the Governor in Council, on the advice of the Minister of Finance, to reduce or remove customs duties where relevant in his opinion to an order of the Board pursuant to section 31.71 (mergers) or 31.76 (specialization agreements) in clause 26. Authorization is also provided for termination of the reductions or removals when they are no longer relevant for purposes of the Board's order.

The section is required notwithstanding section 28 as amended by clause 19 because the latter section is directed towards tariff reductions in connection with offences or with impairment of competition which has already occurred at the time of the tariff reduction.

Clauses 43, 44, 45 and 46:

These clauses would amend the Farm Products Marketing Agencies Act, the National Transportation Act, the Shipping Conferences Exemption Act and other Acts wherever relevant simply to take account of name changes in this Act.

Clauses 47 and 48:

These clauses contain transitional provisions and for the coming into force of the Bill on a day to be fixed by proclamation. All work outstanding on the coming into force would be completed under the terms of the now existing Combines Investigation Act. The Director would be deemed to have been appointed Competition Policy Advocate. Members of the Commission may, if appointed, become members of the Competition Board.

APPENDIX

Schematic Comparison of the Combines Investigation Act and the Proposals of the Present Bill

PRESENT ACT	AMENDMENTS
This column contains the complete text of the present **Combines Investigation Act.**	This column contains all the changes proposed by the Bill. Changes are underlined except when the whole of the section is new.
An Act to provide for the investigation of combines, monopolies, trusts and mergers	"An Act to provide for the general regulation of trade and commerce by promoting competition and the integrity of the market place and to establish a Competition Board and the office of Competition Policy Advocate
	WHEREAS a central purpose of Canadian public policy is to promote the national interest and the interest of individual Canadians by providing an economic environment that is conducive to the efficient allocation and utilization of society's resources, stimulates innovation in technology and organization, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner;
	AND WHEREAS one of the basic conditions requisite to the achievement of that purpose is the creation and maintenance of a flexible, adaptable and dynamic Canadian economy that will facilitate the movement of talents and resources in response to market incentives, that will reduce or remove barriers to such mobility, except where such barriers may be inherent in economies of scale or in the achievement of other savings of resources, and that will protect freedom of economic opportunity and choice by discouraging unnecessary concentration and the predatory exercise of economic power and by reducing the need for detailed public regulation of economic activity;
	AND WHEREAS the effective functioning of such a market economy may only be ensured through the recognition and encouragement of the role of competition in the Canadian economy as a matter of national policy by means of the enactment of general laws of general application throughout Canada and by the administration of such laws in a consistent and uniform manner;

NOW, THEREFORE, Her Majesty, and with the advice and consent of Senate and House of Commons Canada, enacts as follows:"

SHORT TITLE

Short title

1. This Act may be cited as the *Combines Investigation Act*. R.S., c. 314, s. 1.

"**1.** This Act may be cited as the *Competition Act*."

INTERPRETATION

Definitions

2. In this Act

"article" «*article*"

"article" means real and personal property of every description including

(*a*) money,

(*b*) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a company or in any assets of a company,

(*c*) deeds and instruments giving a right to recover or receive property,

(*d*) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(*e*) energy, however generated;

"Board"

" "Board" means the Competition Bo established by subsection 16(1);"

"business" «*entreprise*»

"business" includes the business of

(*a*) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(*b*) acquiring, supplying and otherwise dealing in services;

"Commission" means the Restrictive Trade Practices Commission appointed under this Act;

(repealed)

"corporation" «*corporation*»

"corporation" includes "company";

"corporation" includes a company and other body corporate wherever and h ever incorporated;"

"Competition Policy Advocate"

"Director" means the Director of Investigation and Research appointed under this Act;

" "Competition Policy Advocate" me the Competition Policy Advo appointed under subsection 5(1);

"merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part

(repealed)

of the business of a competitor, supplier, customer or any other person, whereby competition

(*a*) in a trade, industry or profession,

(*b*) among the sources of supply of a trade, industry or profession,

(*c*) among the outlets for sales of a trade, industry or profession, or (repealed)

(*d*) otherwise than in paragraphs (*a*), (*b*) and (*c*),

is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others;

ster" stre»

"Minister" means the Minister of Consumer and Corporate Affairs;

"monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others, but a situation shall not be deemed a monopoly within the meaning of this definition by reason only of the exercise of any right or enjoyment of any interest derived under the *Patent Act*, or any other Act of the Parliament of Canada; (repealed)

duct" duit» ice" ice»

"product" includes an article and a service;

"service" means a service of any description whether industrial, trade, professional or otherwise; (repealed)

ply" nir»

"supply" means,

(*a*) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and

(*b*) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service;

le, industry ofession" merce...»

"trade, industry or profession" includes any class, division or branch of a trade, industry or profession. R.S., c. C-23, s. 2; 1974-75-76, c. 76, s. 1.

ects of form

3. No proceedings under this Act shall be

deemed invalid by reason of any defect of form or any technical irregularity. R.S., c. 314, s. 3.

Collective bargaining activities

4. (1) Nothing in this Act applies in respect of

(*a*) combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees;

(*b*) contracts, agreements or arrangements between or among fishermen or associations of fishermen and persons or associations of persons engaged in the buying or processing of fish relating to the prices, remuneration or other like conditions under which fish will be caught and supplied to such persons by fishermen; or

(*c*) contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession whether effected directly between or among such employers or through the instrumentality of a corporation or association of which such employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.

"(*c*) contracts, agreements or arran ments between or among two or m employers in a trade, industry or pro sion whether effected directly betw or among such employers or through instrumentality of a corporation or as ciation of which such employers members, pertaining to collective b gaining with their employees or w workmen in respect of salary, wages other remuneration and terms or co tions of employment or engagement.

Limitation

(2) Nothing in this section exempts from the application of any provision of this Act a contract, agreement or arrangement entered into by an employer to withhold any product from any person, or to refrain from acquiring from any person any product other than the services of workmen or employees. R.S., c. C-23, s. 4; 1974-75-76, c. 76, s. 2.

(2) Nothing in this section exem from the application of any provision this Act a contract, agreement or arran ment entered into by an employer to wi hold selectively any product from a person, or to refrain selectively fr acquiring from any person any prod other than the services of workmen employees."

Underwriters

4.1 (1) Sections 32 and 38 do not apply in respect of an agreement or arrangement between or among persons who are members of a class of persons who ordinarily engage in the business of dealing in securities or between or among such persons and the issuer of a specific security, in the case of a primary distribution, or the vendor of a specific security, in the case of a secondary distribution, where such agreement or arrangement has a reasonable relationship to the underwriting

of a specific security.

n of iting"

(2) For the purposes of this section, "underwriting" of a security means the primary or secondary distribution of the security, in respect of which distribution

(*a*) a prospectus is required to be filed, accepted or otherwise approved under or pursuant to a law enacted in Canada for the supervision or regulation of trade in securities, or

(*b*) a prospectus would be required to be filed, accepted or otherwise approved but for an express exemption contained in or given pursuant to a law mentioned in paragraph (*a*). 1974-75-76, c. 76, s. 2.

sport

4.2 (1) This Act does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport.

n of r sport"

(2) For the purposes of this section, "amateur sport" means sport in which the participants receive no remuneration for their services as participants. 1974-75-76, c. 76, s. 2.

"**4.3** (1) Subject to subsection (2), sections 31.71 and 32 do not apply in respect of

(*a*) an agreement or arrangement

(i) between or among banks, relating only to services rendered between or among them,

(ii) between or among banks relating to a customer of each of them where the customer has knowledge of the agreement or arrangement,

(iii) between or among banks and a customer of one or more of them relating to the services to be supplied by such banks to the customers of such customer,

(iv) between or among banks for the utilization or development by them of common facilities,

(v) in so far only as it relates to reasonable terms and conditions of participation in guaranteed or insured loan programs authorized by or pur-

suant to an Act of Parliament
the legislature of a province, or

(vi) in respect of which the Mir
of Finance has certified to the
petition Policy Advocate the nam
the parties thereto and that he
requested or approved the agree
or arrangement for purposes of n
tary or financial policy; or

(*b*) a merger between or among b
only, in respect of which the Minist
Finance has certified to the Compet
Policy Advocate the names of the
ties thereto and that the merger is d
able in the interest of the stability o
financial system.

Exception

(2) Subsection (1) does not appl
exempt from the application of sectio
an agreement or arrangement referre
in any of subparagraphs (1)(*a*)(i) to
where the agreement or arrangement
lessened or is likely to lessen compet
unduly in respect of one of the followin

(*a*) prices,

(*b*) quantity or quality of productio

(*c*) markets or customers, or

(*d*) channels or methods of distribut

or where the agreement or arrangen
has restricted or is likely to restrict
person from entering into or expandi
business in a trade, industry or professi

Specialization agreements

4.4 Section 32, and section 31.4
applies to exclusive dealing, do not a
in respect of a specialization agreeme
defined in section 31.76 while the ag
ment is allowed by the Board or in res
of any such agreement and any modi
tion thereof while the agreement and
modification are allowed by the Board.

Regulated conduct

4.5 (1) Part IV.1 and sections 32, 3
32.3, 33, 34, 35 and 38 do not appl
respect of regulated conduct.

Definitions

"public agency"

(2) For the purposes of this section,

"public agency" means any person or
sons who individually or as a b

whether corporate or otherwise, derive power to regulate conduct from an Act of Parliament or of the legislature of a province and includes a Minister of the Crown in right of Canada or of a province on whom such a power is conferred and the Governor in Council or Lieutenant Governor in Council of a province where such a power is conferred on him;

"regulated conduct" means conduct in respect of which the following conditions are met:

(*a*) the conduct has been expressly required or authorized by a public agency that is not appointed or elected by the persons, or by classes or representatives of the persons, whose conduct is subject to be regulated by such agency;

(*b*) the public agency mentioned in paragraph (*a*) is expressly empowered, by or pursuant to an Act of Parliament or of the legislature of a province, to regulate the conduct in the manner in which it is being regulated and has expressly directed its attention to the regulation of the conduct; and

(*c*) the application of this Act to the conduct, in the specific circumstances of the case, would seriously interfere with the attainment of the primary regulatory objectives of an Act referred to in paragraph (*b*).

f federal etc.

4.6 (1) A board, commission or other agency or person that is empowered by or pursuant to an Act of Parliament to regulate a trade, industry or profession by

(*a*) fixing, approving or controlling prices, fees or rates charged by persons carrying on the trade, industry or profession,

(*b*) fixing, approving or controlling conditions of entry into the trade, industry or profession,

(*c*) regulating, approving or controlling mergers therein, or

(*d*) fixing, approving or controlling the quantity or quality of products supplied

by persons carrying on the trade, i
try or profession

shall exercise its powers in such a w
to achieve the objectives of the enact
from which it derives those powers a
those objectives can be achieved b
exercise of its powers in more than
manner, shall exercise its power
achieve those objectives in whichev
those manners is least restrictiv
competition.

Appeal or judicial review

(2) A decision or order of a b
commission or other agency or p
referred to in subsection (1) may n
appealed and is not subject to review
be restrained, prohibited, removed,
aside or otherwise dealt with on
ground that the decision or order doe
represent an exercise of the powers o
board, commission or other agenc
person in a manner such as to achieve
objectives of the enactment from whi
derives those powers in the manner th
least restrictive of competition excep
the instance of the Competition P
Advocate in a case where, pursuan
section 27.1, the Competition Policy A
cate has intervened in the matter."

PART I

INVESTIGATION AND RESEARCH

Competition Policy Advocate

5. (1) The Governor in Council may appoint an officer to be known as the Director of Investigation and Research.

"**5.** (1) The Governor in Council
appoint an officer to be known as
Competition Policy Advocate.

Salary

(2) The Director shall, before entering upon his duties, take and subscribe, before the Clerk of the Privy Council, an oath, which shall be filed in the office of the Clerk, in the following form:

I do solemnly swear that I will faithfully, truly and impartially, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as Director of Investigation and Research. So help me God.

(2) The Competition Policy Advo
shall be paid such salary as may be f
time to time fixed and allowed by
Governor in Council."

(3) The Director shall be paid such salary as may be from time to time fixed and allowed by the Governor in Council. R.S., c. 314, s. 5.

Direc-

6. (1) One or more persons may be appointed Deputy Directors of Investigation and Research, in the manner authorized by law.

(2) The Governor in Council may authorize a Deputy Director to exercise the powers and perform the duties of the Director whenever the Director is absent or unable to act or whenever there is a vacancy in the office of Director.

f other

(3) The Governor in Council may authorize any person to exercise the powers and perform the duties of the Director whenever the Director and the Deputy Directors are absent or unable to act or, if one or more of those offices are vacant, whenever the holders of the other of such offices are absent or unable to act.

by Director

(4) The Director may authorize a Deputy Director to make inquiry regarding any matter into which the Director has power to inquire, and when so authorized a Deputy Director shall perform the duties and may exercise the powers of the Director in respect of such matter.

f Direc- fected

(5) The exercise, pursuant to this Act, of any of the powers or duties of the Director by a Deputy Director or other person does not in any way limit, restrict or qualify the powers or duties of the Director, either generally or with respect to any particular matter. R.S., c. 314, s. 6.

tion for

7. (1) Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that

(*a*) a person has contravened or failed to comply with an order made pursuant to section 29, 29.1 or 30,

(*b*) grounds exist for the making of an order by the Commission under Part IV.1, or

(*c*) an offence under Part V or section 46.1

has been or is about to be committed,
may apply to the Director for an inquiry into such matter.

Material to be submitted

(2) The application shall be accompanied by a statement in the form of a solemn or statutory declaration showing

(*a*) the names and addresses of the applicants, and at their election the name and address of any one of their number, or of any attorney, solicitor or counsel, whom they may, for the purpose of receiving any communication to be made pursuant to this Act, have authorized to represent them;

(*b*) the nature of

(i) the alleged contravention or failure to comply,

(ii) the grounds alleged to exist for the making of an order, or

(iii) the alleged offence

and the names of the persons believed to be concerned therein and privy thereto; and

(*c*) a concise statement of the evidence supporting their opinion. R.S., c. C-23, s. 7; 1974-75-76, c. 76, s. 3.

Inquiry by Director

8. The Director shall

(*a*) on application made under section 7,

(*b*) whenever he has reason to believe that

(i) a person has contravened or failed to comply with an order made pursuant to section 29, 29.1 or 30,

(ii) grounds exist for the making of an order by the Commission under Part IV.1, or

(iii) an offence under Part V or section 46.1 has been or is about to be committed, or

(*c*) whenever he is directed by the Minister to inquire whether any of the circumstances described in subparagraphs (*b*)(i) to (iii) exists,

cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts. R.S., c. C-23, s. 8; 1974-75-76, c. 76, s. 4.

Notice for written returns

9. (1) Subject to subsection (2), the Director may at any time in the course of an

inquiry, by notice in writing, require any person, and in the case of a corporation any officer of the corporation, to make and deliver to the Director, within a time stated in such notice, or from time to time, a written return under oath or affirmation showing in detail such information with respect to the business of the person named in the notice as is by the notice required, and such person or officer shall make and deliver to the Director, precisely as required a written return under oath or affirmation showing in detail the information required; and, without restricting the generality of the foregoing, the Director may require a full disclosure and production of all contracts or agreements which the person named in the notice may have at any time entered into with any other person, touching or concerning the business of the person named in the notice.

ity for

(2) The Director shall not issue a notice under subsection (1) unless, on the *ex parte* application of the Director, a member of the Commission certifies, as such member may, that such notice may be issued to the person or officer of a corporation disclosed in the application. R.S., c. 314, s. 9.

of prem-

10. (1) Subject to subsection (3), in any inquiry under this Act the Director or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.

of persons
trol of
ses, etc.

(2) Every person who is in possession or control of any premises or things mentioned in subsection (1) shall permit the Director or his authorized representative to enter the premises, to examine any thing on the premises and to copy or take away any document

"**10.** (1) Subject to subsection (3), in any inquiry under this Act the Competition Policy Advocate or any representative authorized by him may enter any premises on which the Competition Policy Advocate believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document or other thing that in the opinion of the Competition Policy Advocate or his authorized representative, as the case may be, may afford such evidence.

(2) Every person who is in possession or control of any premises or things mentioned in subsection (1) shall permit the Competition Policy Advocate or his authorized representative to enter the premises, to examine any thing on the

on the premises.

premises and to copy or take away
document or other thing on the premis

Authority for entry

(3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the Commission, which may be granted on the *ex parte* application of the Director, authorizing the exercise of such power.

Application to court

(4) Where any document is taken away under this section for examination or copying, the original or a copy thereof shall be delivered to the custody from which the original came within forty days after it is taken away or within such later time as may be directed by the Commission for cause or agreed to by the person from whom it was obtained.

"(4) When the Competition Po
Advocate or his authorized representa
is refused the permission referred to
subsection (2) or when the Competi
Policy Advocate has reasonable grou
for believing that such permission will
refused, a judge of a superior or cou
court on the *ex parte* application of
Competition Policy Advocate may
order direct a police officer or constabl
take such steps as to the judge seem ne
sary to allow the Competition Po
Advocate or his authorized representa
to do the things referred to in subsect
(2)."

(5) When the Director or his authorized representative acting under this section is refused admission or access to premises or any thing thereon or when the Director has reasonable grounds for believing that such admission or access will be refused, a judge of a superior or county court on the *ex parte* application of the Director may by order direct a police officer or constable to take such steps as to the judge seem necessary to give the Director or his authorized representative such admission or access. R.S., c. 314, s. 10.

Where privilege claimed

"**10.1** (1) Where the Competit
Policy Advocate or his authorized rep
sentative, acting under section 10, is ab
to examine, copy or take away or is in
course of examining, copying or tak
away any book, paper, record or ot
document or any thing on which inform
tion is or may be recorded and a pers
appearing to be in authority claims t
there exists a solicitor-client privilege

respect thereof, the Competition Policy Advocate or his representative may, without examining or further examining it or making a copy or further copy thereof, place it and any copies of it theretofore made by him in a package and seal and identify the package and place it in the custody of the registrar, prothonotary or other like officer of the Federal Court of Canada, or of a superior court in the province in which the document or other thing was found, in the custody of a sheriff of the district or county in which it was found or in the custody of some person agreed on between the Competition Policy Advocate or his representative and the person appearing to be in authority who makes the claim of privilege.

(2) A judge of the Federal Court of Canada, or of a superior court in the province in which a document or other thing referred to in subsection (1) was found, sitting *in camera,* may decide the question of privilege in relation to the document or other thing on application made in accordance with the rules of the court by the Competition Policy Advocate or the owner of the document or other thing or the person in whose possession the document or other thing was found, notice of which application has been given by the applicant to all other persons entitled to make application; but where no such application is made within ten days from the day on which the document or other thing was placed in custody as required by subsection (1), any such judge shall, on an *ex parte* application by or on behalf of the Competition Policy Advocate, order the document or other thing to be delivered to the Competition Policy Advocate.

(3) A judge mentioned in subsection (2) may give any directions that he deems necessary to give effect to this section, may order delivery up to him out of custody of any document or other thing in respect of which he is asked to decide a question of privilege and may inspect any such document or other thing.

Business data stored in computer bank

10.2 (1) Every one who stores in a co puter data bank, wherever situated, d relating to a business carried on by him Canada and who occupies premises Canada shall maintain on premises Canada,

(*a*) a record of the data so stored, s ting out the basic character of the da the products, geographical areas a times to which it relates, the manner which it is classified, the codes, incl ing access codes, relating thereto, file structure thereof and the forms which such data can be retrieved; and

(*b*) a current description of the pro dure to be followed for the purpose retrieving such data in Cana including,

(i) where the data is retrievable means of a terminal instrument loc ed in Canada, a copy of the compu program required for the retrieval the data and the obtaining of a pri out thereof by means of such inst ment, or

(ii) where the data is not retrieval by means of a terminal instrume located in Canada, a description the steps to be taken for the retrie of the data by such person and t obtaining of a print-out or other co of the data in Canada.

Print-out or other copy admissible in evidence

(2) The Competition Policy Advoca may, at any time in the course of inquiry, by notice in writing, require a one who stores in a computer data ba wherever situated, data relating to a bu ness carried on by him in Canada supply the Competition Policy Advoca with a print-out or other copy of any da so stored that is retrievable by means o procedure referred to in paragraph (1)(in any form in which the data can retrieved that is specified in the notice, a any print-out or other copy so supplied admissible as evidence of the data set c therein, without further proof, in any pr ceedings before the Board or in any pro ecution or proceedings before a cou under or pursuant to this Act and is in t

absence of evidence to the contrary, proof of the data and of any apparent effect thereof on proof that the print-out or other copy was supplied in response to a notice given by the Competition Policy Advocate pursuant to this subsection.

(3) A copy of a notice given by the Competition Policy Advocate pursuant to subsection (2) that purports to be certified by him is admissible as evidence in any prosecution or proceedings referred to in subsection (2) without proof of the signature or official character of the person purporting to have certified it.

(4) A print-out or other copy of data supplied to the Competition Policy Advocate in response to a notice given by him pursuant to subsection (2) shall be deemed, for the purposes of section 45, to have been on premises used or occupied by the person who was required by the notice to supply the print-out or other copy.

(5) Subject to subsection 10(3) as it applies for the purposes of this section, in any inquiry under this Act the Competition Policy Advocate or any representative authorized by him may enter any premises on which the Competition Policy Advocate believes there may be any record or description referred to in subsection (1) that might lead to the obtaining of data relevant to the matters being inquired into and, while on such premises, may require any person, whether or not that person is on the premises, to apply or cause to be applied any procedure referred to in paragraph (1)(*b*) for the retrieval of data and the obtaining of a print-out thereof.

(6) The Competition Policy Advocate or his authorized representative may, while on premises entered pursuant to subsection (5), examine and copy or take away for further examination or copying any description, program or print-out referred to in subsection (1) that in the opinion of the Competition Policy Advocate or his authorized representative, as the case may be, may afford or lead to the obtaining of

data relevant to the matters being inqu into.

Application of certain provisions

(7) Subsections 10(2) to (4) and sec 10.1 apply, with such modifications as circumstances require, for the purpose this section."

Inspection of documents

11. (1) All books, papers, records or other documents obtained or received by the Director may be inspected by him and also by such persons as he directs.

"**11.** (1) All books, papers, record other documents or other things obta or received by the Competition P Advocate may be inspected by him also by such persons as he directs."

Copies

(2) The Director may have copies made (including copies by any process of photographic reproduction) of any books, papers, records or other documents referred to in subsection (1), and such copies, upon proof orally or by affidavit that they are true copies, in any proceedings under this Act are admissible in evidence and have the same probative force as the originals; where such evidence is offered by affidavit it is not necessary to prove the signature or official character of the deponent if that information is set forth in the affidavit or to prove the signature or official character of the person before whom such affidavit was sworn. R.S., c. 314, s. 11; 1960, c. 45, s. 4.

Affidavits

12. (1) The Director may, by notice in writing, require evidence upon affidavit or written affirmation, in every case in which it seems to him proper to do so, but the Director shall not so require unless, on the *ex parte* application of the Director, a member of the Commission certifies, as such member may, that the Director may make such a requirement to the person disclosed in the application.

Administration of oaths

(2) The following persons, namely,

(*a*) each member of the Commission,

(*b*) the Director,

(*c*) a Deputy Director or other person exercising the powers of the Director under this Act,

(*d*) any person employed under this Act when so authorized by the Chairman of the Commission, and

(*e*) all persons authorized to administer oaths in or concerning any proceedings had or to be had in the Supreme Court of Canada, the Federal Court of Canada or any of the superior courts of any province,

may administer oaths to be used for the purposes of this Act. R.S., c. 314, s. 12.

13. Whenever in the opinion of the Commission or the Director the public interest so requires, the Commission or the Director may apply to the Attorney General of Canada to appoint and instruct counsel to assist in an inquiry and upon such application the Attorney General of Canada may appoint and instruct counsel accordingly. 1960, c. 45, s. 5; 1966-67, c. 25, s. 45.

"**13.** (1) Whenever in the opinion of the Competition Policy Advocate the assistance of counsel is required for the purposes of an inquiry or to appear on behalf of the Competition Policy Advocate in proceedings under section 27.1, 29 or 39.14 or Part IV.1 or on an apeal from or judicial review of a decision arising out of any such proceedings, the Competition Policy Advocate may apply to the Attorney General of Canada for the appointment of such counsel and on such an application the Attorney General of Canada may appoint counsel accordingly.

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14. (1) At any stage of the inquiry, if the Director is of the opinion that the matter being inquired into does not justify further inquiry, the Director may discontinue the inquiry, but an inquiry shall not be discontinued without the written concurrence of the Commission in any case in which evidence has been brought before the Commission.

"**14.** (1) The Competition Policy Advocate may, at any stage of an inquiry, discontinue it if he is of the opinion that the matter being inquired into does not justify further inquiry."

(2) The Director shall thereupon make a report in writing to the Minister showing the information obtained and the reason for discontinuing the inquiry.

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(3) In any case where an inquiry made on application under section 7 is discontinued, the Director shall inform the applicant of the decision giving the grounds therefor.

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(4) On written request of the applicants or on his own motion, the Minister may review the decision to discontinue the inquiry, and

may, if in his opinion the circumstances warrant, instruct the Director to make further inquiry. R.S., c. 314, s. 14.

Reference to Attorney General of Canada

15. (1) The Director may, at any stage of an inquiry, and in addition to or in lieu of continuing the inquiry, remit any records, returns or evidence to the Attorney General of Canada for consideration as to whether an offence has been or is about to be committed against this Act, and for such action as the Attorney General of Canada may be pleased to take.

Prosecution by Attorney General of Canada

(2) The Attorney General of Canada may institute and conduct any prosecution or other proceedings under this Act, and for such purposes he may exercise all the powers and functions conferred by the *Criminal Code* on the attorney general of a province. R.S., c. 314, s. 15; 1960, c. 45, s. 6.

PART II

CONSIDERATION AND REPORT

Competition Board established

16. (1) There shall be a Commission to be known as the Restrictive Trade Practices Commission consisting of not more than four members appointed by the Governor in Council.

(2) One of the members shall be appointed by the Governor in Council to be Chairman of the Commission; the Chairman is the chief executive officer of the Commission and has supervision over and direction of the work of the Commission.

Qualification for membership

(2.1) One of the members may be appointed by the Governor in Council to be Vice-Chairman of the Commission and any member so appointed shall, whenever the Chairman is absent or unable to act or whenever there is a vacancy in the office of Chairman, exercise the powers and perform the duties of the Chairman.

Chairman

"COMPETITION BOARD

16. (1) There shall be a board, to known as the Competition Board, consi ing of

(*a*) not more than seven and not l than five permanent members, and

(*b*) not more than five associa members,

appointed by the Governor in Council.

(2) At least one of the permanent me bers of the Board shall be a person receipt of a salary or annuity under t *Judges Act* or a barrister or advocate not less than ten years standing at the b of any of the provinces.

(3) One of the permanent members the Board shall be appointed by the Gov nor in Council to be Chairman of t Board and as such he shall be the ch executive officer of the Board and h

irman

(2.2) The Governor in Council may designate a member to exercise the powers and perform the duties of the Chairman of the Commission whenever the Chairman and any Vice-Chairman are absent or unable to act or whenever the offices of Chairman and Vice-Chairman are vacant.

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(3) Each member holds office during good behaviour for a period of ten years from the date of his appointment.

(4) A member on the expiration of his term of office is eligible for re-appointment.

of office

(5) Each member shall be paid such salary as may be from time to time fixed and allowed by the Governor in Council.

(6) When any member by reason of any temporary incapacity is unable to perform the duties of his office, the Governor in Council may appoint a temporary substitute member, upon such terms and conditions as the Governor in Council may prescribe.

(7) A vacancy in the Commission does not impair the right of the remaining members to act.

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(8) Two members constitute a quorum.

(9) The Commission may make rules for the regulation of its proceedings and the performance of its duties and functions under this Act.

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(10) Each member shall, before entering upon his duties, take and subscribe, before the Clerk of the Privy Council, an oath, which shall be filed in the office of the Clerk, in the following form:

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I do solemnly swear that I will faithfully, truly and impartially, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as a member of the Restrictive Trade Practices Commission. So help me God.

supervision over and direction of the work of the Board.

(4) One of the members of the Board may be appointed by the Governor in Council to be Vice-chairman of the Board and any member so appointed shall, whenever the Chairman is absent or unable to act or whenever there is a vacancy in the office of Chairman, exercise the powers and perform the duties of the Chairman.

(5) The Governor in Council may designate a member of the Board to exercise the powers and perform the duties of the Chairman of the Board whenever the Chairman and any Vice-chairman are absent or unable to act or whenever the offices of Chairman and Vice-chairman are vacant.

(6) Subject to subsections (8) and (9), each permanent member of the Board holds office during good behaviour for a term specified in the instrument appointing him, not exceeding ten years from the date of his appointment.

(7) Subject to subsections (8) and (9), each associate member of the Board holds office during good behaviour for a term specified in the instrument appointing him not exceeding three years from the date of his appointment.

(8) Except as provided in subsection (9), a member ceases to be a member of the Board on attaining the age of seventy years but may be removed at any time by the Governor in Council for cause.

(9) A person may continue to act as a member of the Board after the expiration of his period of appointment or after attaining the age of seventy years, as the case may be, in respect of any matter in which he became engaged during the term of his appointment.

(10) Subject to subsection (8), a member of the Board on the expiration or other termination of his term of office is eligible for re-appointment either as a permanent or as an associate member.

Temporary substitute members

(11) The office of the Commission shall be in the city of Ottawa in the Province of Ontario, but sittings of the Commission may be held at such other places as the Commission may decide. R.S., c. C-23, s. 16; R.S., c. 10(1st Supp.), s. 34; 1974-75-76, c. 76, s. 5.

(11) When any permanent memb the Board, by reason of any temp incapacity, is unable to perform the of his office, the Governor in Council appoint a temporary substitute me on such terms and conditions as the G nor in Council may prescribe.

Salaries

16.1 (1) Except in the case of a p in receipt of a salary under the *J Act*, each permanent member of the shall be paid a salary to be fixed b Governor in Council.

Remuneration and duties of associate members

(2) Each associate member of the shall be paid a salary or other remu tion to be fixed by the Governor in C and shall perform such duties and d such part of his time to such duties Chairman of the Board directs.

Expenses of members

(3) Each member of the Board i titled to be paid such travel and expenses incurred by him in the per ance of his duties under this Act a fixed by by-law of the Board made the authority of this subsection, b such by-law has effect unless it is app by the Treasury Board.

Superannuation, etc.

(4) Except in the case of a memb the Board in receipt of a salary unde *Judges Act*, or unless in the case o other member of the Board the Go in Council otherwise directs, the p nent members of the Board sha deemed to be persons employed i Public Service for the purposes o *Public Service Superannuation Act*, be employed in the public servi Canada for the purposes of the *Gc ment Employees Compensation Ac* any regulations made under section the *Aeronautics Act*.

Quorum

16.2 Three members of the Boa whom one at least is a permanent me constitute a quorum of the Board.

Rules

16.3 The Board may make rules erning the exercise of its powers performance of its duties and the re tion of its proceedings.

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16.4 The principal office of the Board shall be in the National Capital Region described in the schedule to the *National Capital Act*, but sittings of the Board may be held at such other places as the Board may decide.

16.5 The Chairman of the Board may designate any three or more members of the Board, at least one of whom is a permanent member, to sit as a panel of the Board and may designate a member to be chairman of the panel and any such panel may, in respect of any matter assigned to it by the Chairman of the Board, exercise all of the powers and perform all of the duties of the Board."

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17. (1) On *ex parte* application of the Director, or on his own motion, a member of the Commission may order that any person resident or present in Canada be examined upon oath before, or make production of books, papers, records or other documents to such member or before or to any other person named for the purpose by the order of such member and may make such orders as seem to him to be proper for securing the attendance of such witness and his examination, and the production by him of books, papers, records or other documents and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof.

"**17.** (1) On *ex parte* application of the Competition Policy Advocate, a member of the Board may order that any person resident or present in Canada be examined on oath before, or make production of books, papers, records or other documents or other things to or before any person, not being a member of the Board, named as a hearing officer by the order and may make such orders as seem to him to be proper for securing the attendance of such witness and his examination, and the production by him of books, papers, records or other documents or other things."

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(2) Any person summoned under subsection (1) is competent and may be compelled to give evidence as a witness.

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(3) A member of the Commission shall not exercise power to penalize any person pursuant to this Act, whether for contempt or otherwise, unless, on the application of the member, a judge of the Federal Court of

"(3) Where any person fails to comply with an order made under subsection (1), a judge of the Federal Court of Canada or of a superior court of the province in which such person is resident or present

Canada or of a superior or county court has certified, as such judge may, that the power may be exercised in the matter disclosed in the application, and the member has given to such person twenty-four hours notice of the hearing of the application or such shorter notice as the judge deems reasonable.

may, on application by the Compe Policy Advocate made on twenty hours notice to such person, or such er notice as the judge directs, order person to comply with the order under subsection (1).

Delivery of documents and other things

(4) Any books, papers, records, or other documents produced voluntarily or in pursuance of an order under subsection (1) shall within thirty days thereafter be delivered to the Director, who is thereafter responsible for their custody, and within sixty days after the receipt of such books, papers, records or other documents by him the Director shall deliver the original or a copy thereof to the person from whom such books, papers, records or other documents were received.

(4) Any books, papers, records, or documents or other things produced v tarily or in pursuance of an order under subsection (1) shall forthwit delivered to the Competition Policy A cate, who is thereafter responsible for custody."

Delivery to Director of seized articles

(5) A justice before whom any thing seized pursuant to a search warrant issued with reference to an offence against this Act is brought may, on the application of the Director, order that such thing be delivered to the Director, and the Director shall deal with any thing so delivered to him as if delivery of it had been made to him pursuant to subsection (4).

Fees

(6) Every person summoned to attend pursuant to this section is entitled to the like fees and allowances for so doing as if summoned to attend before a superior court of the province in which he is summoned to attend.

Commissions to take evidence

(7) The Minister may issue commissions to take evidence in another country, and may make all proper orders for the purpose and for the return and use of evidence so obtained.

"(7) The Chairman of the Board issue commissions to take eviden another country and may make all p orders for the purpose and for the and use of evidence so obtained."

Orders to be signed by a member

(8) Orders to witnesses issued pursuant to this section shall be signed by a member of the Commission. R.S., c. 314, s. 17; 1960, c. 45, s. 7.

Return of documents or copies

18. (1) At any stage of an inquiry,

(a) the Director may, if he is of the opinion that the evidence obtained discloses a sit-

"**18.** (1) The Competition Policy cate shall, within sixty days afte book, paper, record or other doc

uation contrary to any provision in Part V, and

(*b*) the Director shall, if the inquiry relates to an alleged or suspected offence under any provision of Part V and he is so required by the Minister,

prepare a statement of the evidence obtained in the inquiry which shall be submitted to the Commission and to each person against whom an allegation is made therein.

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cuments

(2) Upon receipt of the statement referred to in subsection (1), the Commission shall fix a place, time and date at which argument in support of such statement may be submitted by or on behalf of the Director, and at which such persons against whom an allegation has been made in such statement shall be allowed full opportunity to be heard in person or by counsel.

(3) The Commission shall, in accordance with this Act, consider the statement submitted by the Director under subsection (1) together with such further or other evidence or material as the Commission considers advisable.

(4) No report shall be made by the Commission under section 19 or 22 against any person unless such person has been allowed full opportunity to be heard as provided in subsection (2). R.S., c. C-23, s. 18; 1974-75-76, c. 76, s. 6.

comes into his possession pursuant to section 10 or 17, return the original or a copy thereof to the person from whom it came.

(2) The Competition Policy Advocate shall, within sixty days after any thing to which subsection (1) does not apply comes into his possession pursuant to section 10 or 17, return that thing to the person from whom it came unless, in the opinion of the Competition Policy Advocate, it is required for the purposes of a prosecution or other proceedings before a court or of an application to the Board commenced or made before that time, but where the Competition Policy Advocate is of the opinion that such a thing may be required for the purposes of such a prosecution or other proceeding before a court or of an application to the Board, whether or not the prosecution, proceeding or application has then been commenced or made, he may return the thing to the person from whom it came with a direction that it be retained, unaltered, for such reasonable period of time as is specified in the direction and the person to whom it is returned shall retain the thing as so directed and shall return it to the Competition Policy Advocate whenever, within the period of time so specified, the Competition Policy Advocate so requests."

19. (1) The Commission shall, as soon as possible after the conclusion of proceedings taken under section 18, make a report in writing and without delay transmit it to the Minister.

(repealed)

(2) The report under subsection (1) shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence

and contain recommendations as to the application of remedies provided in this Act or other remedies.

(3) Where it appears from proceedings taken under section 18 that a conspiracy, combination, agreement or arrangement has existed, the report under subsection (1) of this section shall include a finding whether or not the conspiracy, combination, agreement or arrangement relates only to one or more of the matters specified in subsection 32(2) and, if so, shall include a finding whether or not the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the matters specified in paragraphs 32(3)(*a*) to (*d*), or has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

(4) Within thirty days following the transmission of such report to the Minister, the Director shall cause to be delivered into the custody from which they came, if not already so delivered, all books, papers, records and other documents in his possession as evidence relating to the inquiry, unless the Attorney General of Canada certifies that all or any of such documents shall be retained by the Director for purposes of prosecution.

(5) Any report of the Commission shall within thirty days after its receipt by the Minister be made public, unless the Commission states in writing to the Minister it believes the public interest would be better served by withholding publication, in which case the Minister may decide whether the report, either in whole or in part, shall be made public.

(6) The Minister may publish and supply copies of a report referred to in subsection (5) in such manner and upon such terms as he deems proper. R.S., c. C-23, s. 19; 1974-75-76, c. 76, s. 7.

Representation by counsel

20. (1) A member of the Commission may allow any person whose conduct is being inquired into and shall permit any person

"**20.** (1) A hearing officer named unde
section 17 shall permit any person who i
being examined before him under oath t

who is being himself examined under oath to be represented by counsel.

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(2) No person shall be excused from attending and giving evidence and producing books, papers, records or other documents, in obedience to the order of a member of the Commission, on the ground that the oral evidence or documents required of him may tend to criminate him or subject him to any proceeding or penalty, but no oral evidence so required shall be used or receivable against such person in any criminal proceedings thereafter instituted against him, other than a prosecution for perjury in giving such evidence or a prosecution under section 122 or 124 of the *Criminal Code* in respect of such evidence. R.S., c. C-23, s. 20; 1974-75-76, c. 76, s. 8.

rs of Com-
on

21. The Commission or any member thereof has all the powers of a commissioner appointed under Part I of the *Inquiries Act*. R.S., c. 314, s. 21.

22. (1) Notwithstanding subsections 19(1) and (2), when, in any inquiry relating to alleged situations contrary to section 32 or 33, the Commission, after reviewing the statement submitted by the Director and receiving argument in support thereof and in reply thereto, is then unable effectively to appraise the effect on the public interest of the arrangements and practices disclosed in the evidence, it shall make an interim report in writing, which shall contain a review of the evidence and a statement of the reasons why the Commission is unable to appraise effectively the effect of such arrangements and practices on the public interest, and without delay, such report shall be transmitted to the Minister.

(2) In any case where an interim report is made pursuant to subsection (1), the Commission has authority at any time thereafter until a final report as hereinafter provided is made

(*a*) to exercise the powers conferred on a member by section 17,

be represented by counsel.

(2) No person shall be excused from attending and giving evidence and producing books, papers, records or other documents or other things in obedience to the order of a member of the Board on the ground that the oral evidence or documents or other things required of him may tend to criminate him or subject him to any proceeding or penalty, but no oral evidence so required shall be used or receivable against such person in any criminal proceedings thereafter instituted against him, other than a prosecution for perjury in giving such evidence or a prosecution under section 122 or 124 of the *Criminal Code* in respect of such evidence."

(repealed)

(*b*) to require the Director to make further inquiry, and for such purpose the Director may exercise all the powers conferred on him by this Act with respect to an inquiry under section 8,

(*c*) to require the Director to submit to the Commission copies of any books, papers, records or other documents obtained in such further inquiry, and

(*d*) to require by notice in writing any person and in the case of a corporation, any officer of the corporation, to make and deliver to the Commission, within a time stated in such notice, or from time to time, a written return under oath or affirmation showing in detail such information with respect to the business of the person named in the notice as is by the notice required, and such person or officer shall make and deliver to the Commission, precisely as required a written return under oath or affirmation showing in detail the information required; and, without restricting the generality of the foregoing, the Commission may require a full disclosure and production of all contracts or agreements which the person, named in the notice, may have at any time entered into with any other person, touching or concerning the business of the person so named in the notice.

(repealed)

(3) When the Commission has obtained such further information as it deems necessary to appraise effectively the effect on the public interest of the practices and arrangements referred to in subsection (1), it shall make a final report in writing and without delay transmit it to the Minister, and section 19 applies to such report and to all books, papers, records or other documents obtained in the investigation and subsequent inquiry upon which such report is based.

(4) Until the final report is made, the Commission shall, after making an interim report as provided in subsection (1), as soon as possible after the 31st day of March in each year and in any event within three months thereof submit to the Minister an annual report set-

ting out any further action taken and evidence obtained since such interim report was submitted.

(5) Subsections 19(5) and (6) apply to an interim report and an annual report made pursuant to this section. R.S., c. 314, s. 22; 1960, c. 45, s. 10.

PART III

GENERAL

Staff

23. All officers, clerks and employees required for carrying out this Act shall be appointed in accordance with the *Public Service Employment Act*, except that the Director or the Commission may, with the approval of the Governor in Council, employ such temporary, technical and special assistants as may be required to meet the special conditions that may arise in carrying out this Act. R.S., c. 314, s. 24.

"**23.** All officers and employees required in the administration of this Act shall be appointed in accordance with the *Public Service Employment Act*, except that the Competition Policy Advocate or the Board may, with the approval of the Governor in Council, employ or retain such temporary, technical and special assistants as may be required to meet the special conditions that may arise in the administration of this Act.

uneration expenses of porary staff

24. (1) Any temporary, technical and special assistants employed by the Director or the Commission shall be paid for their services and expenses as may be determined by the Governor in Council.

24. (1) Any temporary, technical and special assistants employed or retained by the Competition Policy Advocate or the Board and any hearing officers named under section 17 shall be paid such fees for their services and such amounts in respect of their travel and living expenses as are approved by the Governor in Council.

nuneration expenses ible out of opriations

(2) The remuneration and expenses of the Director and of each member of the Commission and of the temporary, technical and special assistants employed by the Director or the Commission, and of any counsel instructed under this Act, shall be paid out of money appropriated by Parliament to defray the cost of administering this Act.

(2) The remuneration and expenses of the Competition Policy Advocate, of each member of the Board, other than a member who is in receipt of a salary under the *Judges Act*, of the temporary, technical and special assistants employed or retained by the Competition Policy Advocate or the Board, of the hearing officers named under section 17 and of any counsel instructed under this Act shall be paid out of money appropriated by Parliament to defray the cost of administering this Act.

lic Service ployment applies

(3) Except as provided in this section and in sections 5 and 16 of this Act, the *Public Service Employment Act* and other Acts relating to the Public Service, in so far as applicable, apply to each member of the Commis-

(3) Except as provided in this section and in sections 5 and 16 of this Act, the *Public Service Employment Act* and other Acts relating to the Public Service, in so far as applicable, apply to each member of

sion, to the Director and to all other persons employed under this Act. R.S., c. 314, s. 25; 1966-67, c. 25, s. 45.

the Board other than a member who is receipt of a salary under the *Judges A* and an associate member, to the Compet tion Policy Advocate and to all other pe sons employed under this Act."

Authority of technical or special assistants

25. Any technical or special assistant or other person employed under this Act, when so authorized or deputed by the Director, has power and authority to exercise any of the powers and duties of the Director under this Act with respect to any particular inquiry, as may be directed by the Director. R.S., c. 314, s. 26.

Minister may require interim report

26. The Minister may at any time require the Director to submit an interim report with respect to any inquiry by him under this Act, and it is the duty of the Director whenever thereunto required by the Minister to render an interim report setting out the action taken, the evidence obtained and the Director's opinion as to the effect of the evidence. R.S., c. 314, s. 27.

Inquiries to be in private

27. (1) All inquiries under this Act shall be conducted in private, except that the Chairman of the Commission may order that all or any portion of such an inquiry that is held before the Commission or any member thereof be conducted in public.

"27. (1) Every inquiry under this Ac including every examination of a perso and every production of books, paper records or other documents or other thing pursuant to subsection 17(1), shall be co ducted in private.

Proceedings under Part IV.1

(2) All proceedings before the Commission, other than proceedings in relation to an inquiry, shall be conducted in public, except that the Chairman of the Commission may order that all or any portion of such proceedings be conducted in private. R.S., c. C-23, s. 27; 1974-75-76, c. 76, s. 9.

(2) All proceedings before the Boa under section 29 and Part IV.1 shall conducted in public except that the Chai man of the Board may order that all any portion of such proceedings be co ducted in private.

Confidentiality

(3) Subject to subsection 27.1(3), evidence or information obtained by th Competition Policy Advocate through th exercise of a power conferred on him b this Act shall be disclosed by the Compet tion Policy Advocate to any person excep for the purposes of this Act, and no ev dence or information obtained by an other person in the course of his duti under this Act shall be disclosed by tha person to any person not employed

retained for the purposes of this Act except for the purposes of this Act and with the consent of the Competition Policy Advocate.

(4) The Chairman of the Board may order that all or any portion of the evidence or information that is obtained in the course of proceedings before the Board under section 29 and Part IV.1 be not disclosed except to such persons or class of persons as the Chairman of the Board designates.

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ds, etc.

27.1 (1) The Director, at the request of any federal board, commission or other tribunal or upon his own initiative, may, and upon direction from the Minister shall, make representations to and call evidence before any such board, commission or other tribunal in respect of the maintenance of competition, whenever such representations or evidence are or is relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining such matter.

27.1 (1) The Competition Policy Advocate, at the request of any federal board, commission or other agency, or on his own initiative, may, and on direction from the Minister shall, intervene in any matter before such a board, commission or other agency for the purpose of making representations in respect of any aspect of the central purpose of Canadian public policy expressed in the preamble to this Act including the maintenance of competition and the efficient allocation and utilization of resources whenever such representations are, in the opinion of the Competition Policy Advocate or the Minister, relevant to a matter before the board, commission or other agency, and to the factors that the board, commission or other agency is entitled to take into consideration in determining such matter.

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(2) For the purposes of this section, "federal board, commission or other tribunal" means any board, commission, tribunal or person who is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product and includes an *ad hoc* commission of inquiry charged with any such responsibility but does not include a court. 1974-75-76, c. 76, s. 9.

(2) Where the Competition Policy Advocate, under subsection (1), intervenes before a federal board, commission or other agency in respect of any matter before it, or notifies such a board, commission or other agency that he proposes to do so,

(*a*) the board, commission or other agency shall enter the name of the Competition Policy Advocate on any record relating to the matter;

(*b*) the board, commission or other agency shall, notwithstanding any other Act, afford the Competition Policy Advocate access to any evidence or material that forms part of the record in relation to the matter or would form

part of the record in relation thereto i
record were maintained;

(*c*) the Competition Policy Advoca
may, in so far as it is consistent with t
ordinary procedure of the board, co
mission or other agency, call and exa
ine witnesses before it, cross-exami
witnesses called before it by any oth
party to the matter and submit materi
and arguments to the board, commissi
or other agency; and

(*d*) the Competition Policy Advoca
shall have all other rights, not referr
to in paragraphs (*a*) to (*c*), of any par
to the matter including any right
appeal or to otherwise obtain a review
any decision of the board, commissio
or other agency in relation to the matt
as if he were a party aggrieved or othe
wise affected by the decision.

Confidentiality

(3) The Competition Policy Advoca
shall maintain, in respect of any eviden
or material to which he gains access und
this section, the same degree of confide
tiality that is required of or afforded
the federal board, commission or oth
agency in relation thereto.

"Federal board, commission or other agency" defined

(4) For the purposes of this sectio
"federal board, commission or other age
cy" means a board, commission, agency
person who is expressly charged by
pursuant to an Act of Parliament with t
responsibility of making decisions
recommendations related directly or i
directly to the production, supply, acqui
tion or distribution of a product a
includes an *ad hoc* commission of inqui
charged with any such responsibility b
does not include a person or perso
appointed under section 96 of the *Britis
North America Act, 1867,* while acting
the capacity in which they were
appointed, the Governor in Council or t
Treasury Board."

PART IV

SPECIAL REMEDIES

on or of duties

28. Whenever, from or as a result of an inquiry under this Act, or from or as a result of a judgment of the Supreme Court or Federal Court of Canada or of any superior, district or county court in Canada, it appears to the satisfaction of the Governor in Council that with regard to any article there has existed any conspiracy, combination, agreement, arrangement, merger or monopoly to promote unduly the advantage of manufacturers or dealers at the expense of the public, and if it appears to the Governor in Council that such disadvantage to the public is presently being facilitated by the duties of customs imposed on the article, or on any like article, the Governor in Council may direct either that such article be admitted into Canada free of duty, or that the duty thereon be reduced to such amount or rate as will, in the opinion of the Governor in Council, give the public the benefit of reasonable competition. 1960, c. 45, s. 11.

"**28.** Whenever, from or as a result of an inquiry under this Act or a judgment or decision of a court or the Board in proceedings under or pursuant to this Act, it appears to the satisfaction of the Governor in Council that competition in respect of any product has been impaired as a result of conduct that is prohibited by this Act or in respect of which the Board may make an order under this Act and that such result is facilitated by duties of customs, or can be ameliorated by a removal or reduction of duties of customs, applicable to any article, the Governor in Council may, by order, remove or reduce any such duties of customs.

ion by Board

29. In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention or by one or more trade marks so as

(*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce, or

(*b*) to restrain or injure, unduly, trade or commerce in relation to any such article or commodity, or

(*c*) to prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably to enhance the price thereof, or

(*d*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Federal Court of Canada, on an information exhibited by the Attorney General of

29. (1) Where, on application by the Competition Policy Advocate, and, except where subsection (3) applies, after affording every person against whom an injunction is sought a reasonable opportunity to be heard, the Board finds that a *prima facie* case has been presented to the effect that a person against whom an injunction is sought has engaged, is about to engage or is likely to engage in conduct that would afford grounds for the making of an order by the Board against him under any provision of Part IV.1 and that serious injury to competition or to the business of another person is thereby threatened, the Board, acting on the principles applied by the Federal Court of Canada in respect of injunctions, may, by order, enjoin that person against whom an injunction is sought from engaging or continuing to engage in any such conduct pending the commencement or completion of proceed-

Canada, may for the purpose of preventing any use in the manner defined above of the exclusive rights and privileges conferred by any patents or trade marks relating to or affecting the manufacture, use or sale of such article or commodity, make one or more of the following orders:

Notice of application

(*e*) declaring void, in whole or in part, any agreement, arrangement or licence relating to such use;

Ex parte application

(*f*) restraining any person from carrying out or exercising any or all of the terms or provisions of such agreement, arrangement or licence;

(*g*) directing the grant of licences under any such patent to such persons and on such terms and conditions as the court may deem proper, or, if such grant and other remedies under this section would appear insufficient to prevent such use, revoking such patent;

(*h*) directing that the registration of a trade mark in the register of trade marks be expunged or amended; and

Terms of injunction

(*i*) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use;

but no order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents or trade marks to which Canada is a party. R.S., c. 314, s. 30.

ings under Part IV.1 against him.

(2) Subject to subsection (3), at forty-eight hours notice of an applic for an injunction under subsection shall be given by the Competition P Advocate to each person against whom injunction is sought.

(3) Where the Board, on an applica under subsection (1), is satisfied that

(*a*) subsection (2) cannot reasonabl complied with, or

(*b*) the urgency of the situation is s that service of notice in accordance subsection (2) would not be in the pu interest,

it may proceed with the application *parte* but any injunction issued under section (1) on *ex parte* application s have effect only for such period, exceeding ten days, as is specified in order.

(4) An injunction issued under sub tion (1)

(*a*) shall be in such terms as the Bo considers necessary and sufficient meet the circumstances of the case; a

(*b*) subject to subsection (3), shall h effect for such period of time as is sp fied therein.

Extension or cancellation of injunction

(5) The Board, at any time and fr time to time on application by the Com tition Policy Advocate, or any person whom an injunction issued under subs tion (1) was directed, notice of wh application has been given to all ot persons who are parties to the injunct or were parties to the application un subsection (1), may by order

(*a*) notwithstanding subsections (3) a (4), continue the injunction, with without modification, for such defin period as is stated in the order; or

(*b*) revoke the injunction.

(6) Where an injunction is issued under subsection (1), the Competition Policy Advocate shall proceed as expeditiously as possible to commence or complete proceedings under Part IV.1 arising out of the conduct in respect of which the injunction was issued."

29.1 (1) Where it appears to a court, on an application by or on behalf of the Attorney General of Canada or the attorney general of a province,

(*a*) that a person named in the application has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part V or section 46.1, and

(*b*) that if the offence is committed or continued

(i) injury to competition that cannot adequately be remedied under any other section of this Act will result, or

(ii) a person is likely to suffer, from the commission of the offence, damage for which he cannot adequately be compensated under any other section of this Act and that will be substantially greater than any damage that a person named in the application is likely to suffer from an injunction issued under this subsection in the event that it is subsequently found that an offence under Part V or section

46.1 has not been committed, was not about to be committed and was not likely to be committed,

the court may, by order, issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence, pending the commencement or completion of a prosecution or proceedings under subsection 30(2) against the person.

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an injunction under subsection (1) shall be given by or on behalf of the Attorney General of Canada or the attorney general of a province,

"29.1 (1) Where it appears to a court, on an application by or on behalf of the Attorney General of Canada or the attorney general of a province that a *prima facie* case has been presented to the effect that a person against whom an injunction is sought has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part V or section 46.1, and that serious injury to competition or to the business of another person is thereby threatened, the court may, by order, enjoin that person from doing any act or thing that it appears to the court may constitute or be directed toward the commission of such an offence, pending the commencement or completion of a prosecution or proceedings under subsection 30(3) against the person."

as the case may be, to each person against whom the injunction is sought.

Ex parte application

(3) Where a court to which an application is made under subsection (1) is satisfied that

(*a*) subsection (2) cannot reasonably be complied with, or

(*b*) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte* but any injunction issued under subsection (1) by the court on *ex parte* application shall have effect only for such period, not exceeding ten days, as is specified in the order.

Terms of injunction

(4) An injunction issued under subsection (1)

(*a*) shall be in such terms as the court that issues it considers necessary and sufficient to meet the circumstances of the case; and

(*b*) subject to subsection (3), shall have effect for such period of time as is specified therein.

Extension or cancellation of injunction

(5) A court that issues an injunction under subsection (1), at any time and from time to time on application by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, or by or on behalf of any person to whom the injunction is directed, notice of which application has been given to all other parties thereto, may by order,

"(5) A court that issues an injun
under subsection (1), at any time and
time to time on application by or on b
of the Attorney General of Canada o
attorney general of a province, as the
may be, or by or on behalf of any pers
whom the injunction is directed, noti
which application has been given t
other persons who are parties to
injunction or were parties to the app
tion under subsection (1), may by orde

(*a*) notwithstanding subsections (3) and (4), continue the injunction, with or without modification, for such definite period as is stated in the order; or

(*b*) revoke the injunction.

Duty of applicant

(6) Where an injunction is issued under subsection (1), the Attorney General of Canada or the attorney general of a province, as the case may be, shall proceed as expeditiously as possible to institute and conclude

any prosecution or proceedings arising out of the actions on the basis of which the injunction was issued.

(7) A court may punish any person who contravenes or fails to comply with an injunction issued by it under subsection (1) by a fine in the discretion of the court, or by imprisonment for a term not exceeding two years.

"(7) In this section, "court" means the Federal Court of Canada or a superior court of criminal jurisdiction as defined in the *Criminal Code*."

(8) In this section, "court" means the Federal Court of Canada or a superior court of criminal jurisdiction as defined in the *Criminal Code*. 1974-75-76, c. 76, s. 10.

(repealed)

30. (1) Where a person has been convicted of an offence under Part V

(*a*) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(*b*) a superior court of criminal jurisdiction in the province may at any time within three years thereafter, upon proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section,

and in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed toward the continuation or repetition of the offence and where the conviction is with respect to a merger or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs.

"**30.** (1) Where a person has been convicted of an offence under Part V,

(*a*) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(*b*) the Federal Court of Canada or a superior court of criminal jurisdiction in the province in which the person was so convicted may at any time within three years thereafter, on the application of the Attorney General of Canada or the attorney general of the province for the purposes of this section,

in addition to any other punishment imposed on the person convicted, by order prohibit the continuation of the offence, the repetition thereof or the commission of a like offence or the doing of any act or thing by the person convicted or any other person directed toward the continuation of the offence, the repetition thereof or the commission of a like offence and where the conviction is with respect to a monopoly, may also, by order, direct the person convicted or any other person to dissolve the monopoly or reduce the degree of monopoly or to divest himself of such part of his business or assets as is prescribed in the direction, in a manner prescribed therein.

(2) Where it appears to a superior court of criminal jurisdiction in proceedings com-

(2) At any stage, before conviction, of a prosecution for an offence under Part V,

menced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part V, the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of such an offence, and, where the offence is with respect to a merger or monopoly, direct that person or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs.

Idem

(3) The Attorney General or any person against whom an order of prohibition or dissolution is made may appeal against the order or a refusal to make an order or the quashing of an order

(*a*) from a superior court of criminal jurisdiction in the province to the court of appeal of the province,

(*b*) from the Federal Court—Trial Division to the Federal Court of Appeal, and

(*c*) from the court of appeal of the province or the Federal Court of Appeal to the Supreme Court of Canada

as the case may be, upon any ground that involves a question of law or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows. on any ground that appears to that court to be a sufficient ground of appeal.

Appeals

(4) Where the court of appeal or the Supreme Court of Canada allows an appeal, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

the court before which the proce
were taken may, with the consent
Attorney General by or on whose
the proceedings were taken or his
and of an accused, dismiss the prose
as against that accused and make an
referred to in subsection (1) agains
accused.

(3) Where it appears to the F
Court of Canada or a superior co
criminal jurisdiction on an applicati
the Attorney General of Canada c
attorney general of the province fc
purposes of this section that a perso
done, is about to do or is likely to d
act or thing constituting or dir
toward the commission of an offence
Part V, the court may prohibit the
mission of the offence or the doi
continuation of any act or thing by
person or any other person constituti
directed toward the commission of su
offence, and, where the offence is
respect to a monopoly, may also
that person or any other person to dis
the monopoly or reduce the degr
monopoly or to divest himself of such
of his business or assets as is prescrib
the direction, in a manner presc
therein.

(4) The Attorney General or any p
against whom an order is made unde
section may appeal against the order
refusal to make an order or the qua
of an order

(*a*) from a superior court of cri
jurisdiction in the province to the
of appeal of the province,

(*b*) from a court of criminal jurisdiction in the province to an appeal court in the province,

(*c*) from the Federal Court—Trial Division to the Federal Court of Appeal,

(*d*) from an appeal court in the province to the court of appeal of the province, and

(*e*) from the court of appeal of the province or the Federal Court of Appeal to the Supreme Court of Canada,

as the case may be, on any ground that involves a question of law, or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

(5) Subject to subsections (3) and (4), Part XVIII of the *Criminal Code* applies *mutatis mutandis* to appeals under this section.

(5) Subsection (4) does not apply where an order referred to in subsection (1) is made in circumstances described in subsection (2).

(6) A court may punish any person who contravenes or fails to comply with a prohibition or direction made or given by it under this section by a fine in the discretion of the court, or by imprisonment for a term not exceeding two years.

(6) Where a court appealed to allows an appeal under this section, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

(7) Any proceedings pursuant to an information of the Attorney General of Canada or the attorney general of a province under this section shall be tried by the court without a jury, and the procedure applicable in injunction proceedings in the superior courts of the province shall, in so far as possible, apply.

(7) Subject to subsections (4) and (6), Part XVIII or XXIV of the *Criminal Code*, whichever is appropriate in the circumstances, applies with such modifications as the circumstances require to appeals under this section.

(8) This section applies in respect of all prosecutions under this Act whether commenced before or after the 1st day of November 1952 and in respect of all acts or things, whether committed or done before or after that date.

(8) Any proceedings pursuant to paragraph (1)(*b*) or subsection (3) shall be tried by the court without a jury, and the procedure applicable in injunction proceedings in the Federal Court of Canada or the superior courts of the province, as the case may be, shall, in so far as possible, apply.

Interpretation

(9) In this section "superior court of criminal jurisdiction" means a superior court of criminal jurisdiction as defined in the *Criminal Code*. R.S., c. C-23, s. 30; 1974-75-76, c. 76, s. 11.

(9) In this section, "superior c criminal jurisdiction", "court of c jurisdiction", "court of appeal" "appeal court" have the me assigned to them for the purposes *Criminal Code*."

Court may require returns

31. (1) Notwithstanding anything contained in Part V, where any person is convicted of an offence under Part V, the court before whom such person was convicted and sentenced may, from time to time within three years thereafter, require the convicted person to submit such information with respect to the business of such person as the court deems advisable, and without restricting the generality of the foregoing the court may require a full disclosure of all transactions, operations or activities since the date of the offence under or with respect to any contracts, agreements or arrangements, actual or tacit, that the convicted person may at any time have entered into with any other person touching or concerning the business of the person convicted.

(2) The court may punish any failure to comply with an order under this section by a fine in the discretion of the court or by imprisonment for a term not exceeding two years. 1960, c. 45, s. 13.

(repealed)

Recovery of damages

31.1 (1) Any person who has suffered loss or damage as a result of

(*a*) conduct that is contrary to any provision of Part V, or

(*b*) the failure of any person to comply with an order of the Commission or a court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

"**31.1** (1) Any person who has su loss or damage as a result of

(*a*) conduct that is contrary t provision of Part V, or

(*b*) the failure of any person to c with an order of the Board or a under this Act,

may, in any court of competent jur tion, sue for and recover from the p who engaged in the conduct or fail comply with the order an amount eq the loss or damage proved to have suffered by him or, in the case of pro ings to which Part V.1 does not apply amount that the court may allow exceeding the full cost to him of any i tigation in connection with the matte

of proceedings under this section or an amount equal to the aggregate of such amounts.

(1.1) A court in which proceedings under this section are instituted may, in addition to or in lieu of ordering payment of an amount as described in subsection (1) and whether or not recovery of such an amount is sought in the proceedings, grant any other remedy or relief applied for in the proceedings, whether by way of injunction or otherwise, that the court by reason of its general jurisdiction has authority to grant.

(1.2) Where a remedy or relief other than the recovery of an amount as described in subsection (1) is applied for in proceedings instituted under this section, notice of the proceedings, specifying the remedy or relief applied for, shall be given by the person instituting the proceedings to the Competition Policy Advocate forthwith after the institution thereof.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Commission or a court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part V or failed to comply with an order of the Commission or a court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of such acts or omissions on the person bringing the action is evidence thereof in the action.

(2) In any action under subsection (1) or Part V.1 against a person, the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Board or a court under this Act is, in the absence of proof to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part V or failed to comply with an order of the Board or a court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of such acts or omissions on the person bringing the action is evidence thereof in the action."

(3) For the purposes of any action under subsection (1), the Federal Court of Canada is a court of competent jurisdiction.

(4) No action may be brought under subsection (1),

(a) in the case of an action based on con-

duct that is contrary to any provision of Part V, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(*b*) in the case of an action based on the failure of any person to comply with an order of the Commission or a court, after two years from

(i) a day on which the order of the Commission or court was violated, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later. 1974-75-76, c. 76, s. 12.

PART IV.1

MATTERS REVIEWABLE BY COMMISSION

Jurisdiction of Commission where refusal to deal

31.2 (1) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that

(*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(*b*) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(*c*) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of such product, and

(*d*) the product is in ample supply,

the Commission may,

(*e*) where the product is an article, recommend to the Minister of Finance that any duties of customs on the article be removed, reduced or remitted with respect to the person to the extent necessary to place him on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada, and

(*f*) order that one or more suppliers of the product in the market, who have been afforded a reasonable opportunity to be heard, accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any duties of customs on the article are removed, reduced or remitted and the effect of such removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

article is a te product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless he has access to the article so differentiated.

tion of terms"

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements. 1974-75-76, c. 76, s. 12.

gnment

31.3 Where, on application by the Director, and after affording the supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that the practice of consignment selling has been introduced by a supplier of a product who ordinarily sells the product for resale, for the purpose of

(*a*) controlling the price at which a dealer

in the product supplies the product, or

(*b*) discriminating between consignees or between dealers to whom he sells the product for resale and consignees,

the Commission may order the supplier to cease to carry on the practice of consignment selling of the product. 1974-75-76, c. 76, s. 12.

Definitions

31.4 (1) For the purposes of this section,

"exclusive dealing"

"exclusive dealing" means

(*a*) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or his nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or his nominee, and

(*b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

"market restriction"

"market restriction" means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

"tied selling"

"tied selling" means

(*a*) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire some other product from the supplier or his nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the sup-

plier or his nominee, and

(*b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the tying product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Exclusive dealing and tied selling

(2) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(*a*) impede entry into or expansion of a firm in the market,

(*b*) impede introduction of a product into or expansion of sales of a product in the market, or

(*c*) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Commission may make an order directed to all or any of such suppliers prohibiting them from continuing to engage in such exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Commission may make an order directed to all or any of those suppliers prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Where no order to be made and limitation on application of order

(4) The Commission shall not make an order under this section where, in its opinion,

(*a*) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(*b*) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(*c*) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by him and is reasonably necessary for such purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated

(5) For the purposes of subsection (4),

(*a*) a company is affiliated with another company if

(i) one is a subsidiary of the other,

(ii) both are subsidiaries of the same company,

(iii) both are controlled by the same person, or

(iv) each is affiliated with the same company;

(*b*) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(*c*) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade mark or trade name to identify the business of the grantee, provided

(i) such business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of prod-

ucts obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates such business.

When company deemed to be controlled

(6) For the purposes of this section, a company is deemed to be controlled by a person if shares of the company carrying voting rights sufficient to elect a majority of the directors of the company are held, other than by way of security only, by or on behalf of that person.

When persons deemed to be affiliated

(7) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of such agreement, to be affiliated. 1974-75-76, c. 76, s. 12.

Foreign judgments, etc.

31.5 Where, on application by the Director, and after affording a reasonable opportunity to be heard to all persons and companies to whom an order hereinafter referred to would apply, the Commission finds that

(*a*) a judgment, decree, order or other process given, made or issued by or out of a court or other body in a country other than Canada can be implemented in whole or in part by persons in Canada, by companies incorporated by or pursuant to an Act of Parliament or of the legislature of a province, or by measures taken in Canada, and

(*b*) the implementation in whole or in part of the judgment, decree, order or other process in Canada would

(i) adversely affect competition in Canada,

(ii) adversely affect the efficiency of

trade or industry in Canada without bringing about or increasing in Canada competition that would restore and improve such efficiency,

(iii) adversely affect the foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Commission may, by order, direct that

(*c*) no measures be taken in Canada to implement the judgment, decree, order or process, or

(*d*) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Commission prescribes for the purpose of avoiding an effect referred to in subparagraphs (*b*)(i) to (iv). 1974-75-76, c. 76, s. 12.

Foreign laws and directives

31.6 (1) Where, on application by the Director, and after affording to the person or company, hereinafter referred to, a reasonable opportunity to be heard, the Commission finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province

(*a*) as a result of

(i) a law in force in a country other than Canada, or

(ii) a directive, instruction, intimation of policy or other communication to that person or company or to any other person from

(A) the government of a country other than Canada or of any political subdivision thereof that is in a position to direct or influence the policies of that person or company, or

(B) a person in a country other than Canada who is in a position to direct or influence the policies of that person or company,

where the communication is for the purpose of giving effect to a law in force in a

country other than Canada,

and that the decision, if implemented, would have or would be likely to have any of the effects mentioned in subparagraphs 31.5(*b*)(i) to (iv), or

(*b*) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in violation of section 32,

the Commission may, by order, direct that

(*c*) in a case described in paragraph (*a*) or (*b*), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication, or

(*d*) in a case described in paragraph (*a*), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication except in such manner as the Commission prescribes for the purpose of avoiding an effect referred to in subparagraphs 31.5(*b*)(i) to (iv).

ation

(2) No application may be made by the Director for an order under this section against a particular company where proceedings have been commenced under section 32.1 against that company based on the same or substantially the same facts as would be alleged in the application. 1974-75-76, c. 76, s. 12.

"(*b*) as a result of a directive, instruction, intimation of policy or other communication to that person or corporation or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or corporation, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement, wherever entered into, that has or is likely to have, in Canada, an adverse effect on competition, on prices, on quantity or quality of production or on distribution of a product, or on conditions of entry into a trade, industry or profession,"

"(3) No order may be made by the Board under this section where a conspiracy, combination, agreement or arrangement referred to in paragraph (1)(*b*) was entered into only by corporations each of which is an affiliate, within the meaning of subsection 38(7) and (7.1), of each of the others."

Orders in respect of restriction of importation or exportation

"**31.61** (1) Where, on application the Competition Policy Advocate, after affording every person against wh an order is sought a reasonable oppo nity to be heard, the Board finds tha corporation carrying on business Canada

(*a*) has entered into an agreement arrangement with an affiliate carry on business outside Canada to subst tially restrict the importation or exp tation of a product into or from Cana or

(*b*) has received from or given to affiliate that carries on business outs Canada a directive, instruction, initi tion of policy or other communicat that has brought about or, if impleme ed, would bring about, a substantial striction in the importation or expor tion of a product into or from Canada

and the Board also finds that the rest tion is designed to protect the price leve a Canadian market from the influence lower-priced products from outs Canada or to protect the price level i market outside Canada from the influe of lower-priced products from Cana subject to subsection (2), the Board m by order, direct that the corporation car ing on business in Canada withdraw for with from the agreement or arrangem or refrain from enforcing or implement the communication, as the case may be.

Where no order to be made

(2) No order shall be made under t section in respect of a corporation wh the board is satisfied that the corporat does not account for twenty-five per c or more of the production or supply Canada of the product in relation to wh an application is made for an order agai the corporation.

Where corporations affiliated

(3) For the purposes of this secti corporations are affiliated if they a affiliated within the meaning of subs tions 31.71(12) and (13)."

31.7 Where, on application by the Director, and after affording every person against whom an order is sought a reasonable opportunity to be heard, the Commission finds that a supplier outside Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the "first" person) at the instance of and by reason of the exertion of buying power outside Canada by another person, the Commission may order any person in Canada (the "second" person) by whom or on whose behalf or for whose benefit the buying power was exerted

(*a*) to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of such product and on the same terms and conditions as the second person obtained or obtains from the supplier; or

(*b*) not to deal or to cease to deal, in Canada, in such product of the supplier. 1974-75-76, c. 76, s. 12.

"**31.71** (1) In this section, "merger" means any acquisition or establishment by one or more persons, whether by purchase or lease of shares or assets, amalgamation or otherwise, of any control over or interest in the whole or any part of a business of a competitor, supplier, customer or any other person.

(2) This section applies only to a merger that has not been completed before the coming into force of this section, that lessens or is likely to lessen, substantially, actual or potential competition

(*a*) in a trade, industry or profession,

(*b*) among the sources from which a trade, industry or profession obtains a product,

(*c*) among the outlets through which a trade, industry or profession disposes of a product, or

(*d*) otherwise than as described in paragraphs (*a*) to (*c*),

and that, in the case of a horizontal

merger, results or would be likely to re
in the combined share of the merged p
sons and their affiliates immediately
lowing the merger exceeding twenty
cent of any market.

Dissolution and prohibition of mergers

(3) Where, on application by the C
petition Policy Advocate and after affo
ing every person against whom an orde
sought a reasonable opportunity to
heard, the Board finds that any s
person has been or is about to be a part
a merger to which this section applies,
Board may, subject to subsection
make an order directing that person
dissolve the merger or dispose of as
designated by the Board in such manne
the Board prescribes, or directing him
to proceed with the merger, as the c
may be.

Factors to be considered

(4) In determining whether or not
order should be made under subsect
(3), the Board shall have regard to such
the following factors as, on the inform
tion before it, the Board considers to
relevant:

(*a*) the degree to which acceptable s
stitutes for products supplied by the p
ties to the merger or proposed mer
are or are likely to be available;

(*b*) the degree to which imports offer
are likely to offer effective competit
in respect of products supplied by
parties to the merger or propo
merger;

(*c*) the trend of concentration amo
producers, suppliers and purchasers
products supplied by the parties to
merger or proposed merger;

(*d*) the size differentials between
businesses of the parties to the mer
or proposed merger and any remain
competitors;

(*e*) barriers to entry into the market
which the parties to the merger or p
posed merger carry on business and
effect of the merger or proposed mer
on such barriers;

(*f*) any history of growth by merger on the part of any party to the merger or proposed merger;

(*g*) any history of anti-competitive behaviour on the part of any party to the merger or proposed merger;

(*h*) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor as an independent force in a market;

(*i*) any evidence of intent on the part of a party to the merger or proposed merger to reduce competition or to control a market;

(*j*) any likelihood that the merger or proposed merger will or would result in foreclosure of sources from which a trade, industry or profession obtains a product or outlets through which a trade, industry or profession disposes of a product;

(*k*) any likelihood, where a party to the merger or proposed merger is or would be entering a new market by means of the merger, that such person would, without the merger, have entered that market in a manner less restrictive of competition;

(*l*) the nature and extent of change and innovation in a market;

(*m*) any likelihood that the merger or proposed merger will or would stimulate competition; and

(*n*) any likelihood that a firm that is a party to the merger or proposed merger was or is about to fail.

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(5) The Board shall not make an order under subsection (3) where it is satisfied by the parties to a merger or proposed merger to which this section applies that the merger or proposed merger has brought about or that there is a high probability that it will bring about substantial gains in efficiency, by way of savings of resources for the Canadian economy that are not reasonably attainable by means

other than the merger.

Failure to prohibit or dissolve on conditions

(6) The Board may provide in an o made pursuant to subsection (3) tha order shall not take effect if, with reasonable period of time specified ir order,

(*a*) an order in council is made u section 16 of the *Customs Tariff* ef ing a reduction or reductions specifi the order of the Board in any rele duties of customs;

(*b*) an order in council is made u section 17 of the *Financial Adminis tion Act* effecting a remission or re sions specified in the order of the B of any relevant duties of customs,

(*c*) there has taken place a lowe specified in the order, of other t barriers,

(*d*) there has occurred some other specified in the order that is irrever by the parties to the merger or prop merger, or

(*e*) there has occurred such comb tion of the acts referred to in paragr (*a*) to (*c*) and of other acts that coul specified pursuant to paragraph (*d*) specified in the order

that would, in the opinion of the Bo prevent the merger or proposed me from lessening competition substantiall

Idem

(7) Where the Board finds that

(*a*) subsection (5) applies in respect merger or proposed merger to which section applies, and

(*b*) the merger or proposed merger or is likely to result in virtually comp control by the parties to the merge proposed merger in respect of a pro in a market,

the Board shall, notwithstanding sub tion (5), make an order under subsec (3), but where the Board finds that t are in effect duties of customs or o trade barriers in respect of a product duced or supplied or intended to be duced or supplied by the merged firm

the firms proposing to merge, the reduction or remission of which would prevent the merger or proposed merger from lessening competition substantially in respect of the product, or the Board finds that some other act or acts, irreversible by the parties to the merger or proposed merger would have that effect, the Board may condition the order in the manner described in subsection (6).

(8) In determining under this section whether or not a merger is or is likely to lessen competition substantially, the Board shall not exclude from consideration any evidence by reason only that such evidence is evidence of conduct that constitutes an offence under this Act or in respect of which an order could be made by the Board under any other provision of this Part.

(9) Where the Agency established by the *Foreign Investment Review Act* is given notice pursuant to subsection 8(1) of that Act or is given notice pursuant to subsection 8(3) of that Act in respect of an investment referred to in subparagraph 8(3)(*a*)(i) or (*b*)(i) of that Act, the Agency shall, notwithstanding section 14 of that Act, forthwith supply a copy of the notice to the Competition Policy Advocate.

(10) Where a notice has been given to the Agency referred to in subsection (9) pursuant to section 8 of the *Foreign Investment Review Act* and a copy of the notice has been supplied to the Competition Policy Advocate pursuant to subsection (9) of this section, the Competition Policy Advocate, if he is of the opinion that the investment in respect of which the notice was given would, if carried into effect, substantially lessen competition, shall be deemed, for the purposes of section 8 of this Act, to have reason to believe that grounds exist for the making of an order by the Board under this Part in respect of the investment.

Relationship to *Foreign Investment Review Act*

(11) Nothing in, or done under the thority of, the *Foreign Investment Re Act* constitutes a determination of matter for the purposes of this Act o any proceedings under this Act and dence that an investment has b allowed, is deemed to have been allowe has not been allowed by the Governo Council pursuant to the *Foreign Inv ment Review Act* is inadmissible in proc dings under this Act.

Where corporations, partnerships or sole proprietorships affiliated

(12) For the purposes of subsection (

(*a*) a corporation is affiliated v another corporation if

(i) one is controlled by the other,

(ii) both are controlled by the sa person or group of persons acting concert, or

(iii) each is affiliated with the sa corporation; and

(*b*) a partnership or sole proprietors is affiliated with another partnershi sole proprietorship if

(i) one is controlled by the other,

(ii) both are controlled by the sa person or group of persons acting concert, or

(iii) each is affiliated with the sa partnership or person.

Where corporation, partnership or sole proprietorship controlled

(13) For the purposes of subsect (12), a corporation, partnership or s proprietorship is controlled by a perso group of persons acting in concert, if t person or group is in fact able, from ti to time, to direct the policies of that cor ration, partnership or sole proprietorshi

Definition of "monopoly"

31.72 (1) For the purposes of this s tion, "monopoly" means a situation wh one person or two or more persons who affiliated within the meaning of subs tions 31.71(12) and (13) substantially c trol throughout Canada or any area the of a class or species of business in wh they are engaged.

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(2) Where, on application by the Competition Policy Advocate, and after affording every person against whom an order is sought a reasonable opportunity to be heard, the Board finds that a person or persons have engaged in monopolization in that they

(*a*) have sought or are seeking to create a monopoly or to entrench a monopoly or to extend monopoly power into another market, by behaviour that has or is likely to have the effect of

(i) restricting entry into a market,

(ii) foreclosing to a competitor sources from which he might obtain a product or outlets through which he might dispose of a product,

(iii) eliminating a competitor by predatory pricing, whether or not based on cross-subsidization, by deliberately narrowing the margin between the cost to a customer and the price the customer can obtain in the market where the customer is also a competitor, or by any other predatory practice,

(iv) directly or indirectly coercing a competitor into avoiding, abandoning or restricting competitive behaviour or punishing him for past competitive behaviour, or otherwise disciplining him, or

(v) restraining economic activity in a manner otherwise than as described in subparagraphs (i) to (iv); or

(*b*) have sought or are seeking to create a monopoly or to entrench a monopoly or to extend monopoly power into another market by any behaviour or conduct, whether or not described in paragraph (*a*), on the basis of which the

Board could make an order under any other provision of this Part or that is in contravention of any provision of Part V,

the Board may make an order directed to any person who has been so afforded an opportunity to be heard

(*c*) prohibiting him from engagin continuing to engage in any behaviour or conduct,

(*d*) directing him to take such actio the Board considers necessary to o come the effects of any such behav or conduct or to stimulate or res competition that has been impaire such behaviour or conduct, or

(*e*) where the Board finds tha remedy described in paragraph (*c*) (*d*) will not suffice to stimulate restore, in any relevant market, con tition that has been impaired by such behaviour or conduct, direc him to dissolve the monopoly or red the degree of monopoly or to divest h self of such part of his business or as as is prescribed in the order, i manner prescribed therein.

Limitation

(3) No application may be made by Competition Policy Advocate for an or under this section against a particu person where

(*a*) an application has been made by Competition Policy Advocate under s tion 31.73 for an order against t person, or

(*b*) proceedings have been commen under section 33 against that person,

based on the same or substantially same facts as would be alleged in application under this section.

Where no order to be made

(4) No order shall be made under t section on the sole basis of behaviour th has or is likely to have an effect descri in subparagraph (2)(*a*)(i) or (ii) where Board is satisfied by the party or part against whom the order is sought that su behaviour solely reflects superior effici cy or superior economic performance.

Where situation may be monopoly

(5) For greater certainty, one or m persons may be found for the purposes subsection (1) to have substantial cont of a class or species of business in wh they are engaged notwithstanding th they account for less than fifty per cent

a class or species of business in which they are engaged.

tion of

oliza-

31.73 (1) For the purposes of this section, "joint monopolization" means a situation where a small number of persons, not all of whom are affiliated within the meaning of subsections 31.71(12) and (13), achieve or seek to achieve substantial control throughout Canada or any area thereof, of a class or species of business in which they are engaged by adopting closely parallel policies or closely matching conduct which policies have or conduct has the effect of

(*a*) restricting entry into a market;

(*b*) foreclosing to a competitor sources from which he might obtain a product or outlets through which he might dispose of a product;

(*c*) eliminating a competitor by predatory pricing, whether or not based on cross-subsidization, by deliberately narrowing the margin between the cost to a customer and the price the customer can obtain in the market where the customer is also a competitor, or by any other predatory practice;

(*d*) directly or indirectly coercing a competitor into avoiding, abandoning or restricting competitive behaviour, or punishing him for past competitive behaviour, or otherwise disciplining him;

(*e*) restraining economic activity by behaviour or conduct, whether or not described in any of paragraphs (*a*) to (*d*), on the basis of which the Board could make an order under any other provision of this Part or that is in contravention of any provision of Part V; or

(*f*) restraining economic activity in a manner otherwise than as described in paragraphs (*a*) to (*e*).

ers in
ect of joint
opolization

(2) Where, on application by the Competition Policy Advocate, and after affording every person against whom an order is sought a reasonable opportunity to be heard, the Board finds that a person has

been a party to joint monopolization, Board may make an order directed to person who has been so afforded an opp tunity to be heard

(*a*) prohibiting him from engaging continuing to engage in any policies conduct specified in the order that Board finds to have had or to be lik to have one or more of the effe described in subsection (1);

(*b*) directing him to take such action the Board considers necessary to ov come the effects of such policies or c duct or to stimulate or restore in relevant market competition that been impaired by such policies or c duct; or

(*c*) where the Board finds that remedy described in paragraph (*a*) (*b*) will not suffice to stimulate restore, in any relevant market, com tition that has been impaired by such policies or conduct, directing h to dissolve the monopoly or reduce degree of monopoly or to divest hims of such part of his business or assets is prescribed in the order, in a man prescribed therein.

Where situation may be joint monopolization

(3) For the purposes of this section small number of persons may be found have been engaging in joint monopoli tion notwithstanding that the parallel p cies or matching conduct adopted by th was based on nothing more than a mut recognition of their interdependence a that there was no agreement or arran ment between or among them.

Limitation

(4) No application may be made by Competition Policy Advocate for an or under this section against a particu person where

(*a*) an application has been made by Competition Policy Advocate under s tion 31.72 for an order against th person, or

(*b*) proceedings have been commenc under section 33 against that person,

based on the same or substantially the same facts as would be alleged in the application under this section.

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t of
s, etc.

31.74 (1) Where, on application by the Competition Policy Advocate, and after affording every person against whom an order is sought a reasonable opportunity to be heard, the Board finds that a person or persons, by exercising any right or interest in a patent, trade mark, copyright or industrial design in a manner not expressly authorized by the enactment conferring or authorizing the right or interest, have affected or are likely to affect competition adversely in a market, the Board may make an order directed to any person who has been so afforded an opportunity to be heard

(*a*) declaring unenforceable, in whole or in part, any agreement, arrangement or licence into which that person has entered relating to the use of the patent, trade mark, copyright or industrial design;

(*b*) restraining that person from carrying out or exercising any or all of the terms or provisions of an agreement, arrangement or licence mentioned in paragraph (*a*);

(*c*) directing the granting by that person of licences under the patent, trade mark, copyright or industrial design to such persons and on such terms and conditions as are specified in the order; or

(*d*) where the Board finds that a remedy described in any of paragraphs (*a*) to (*c*) will not suffice to stimulate or restore, in any market, competition that has been impaired by such exercise of a right or interest, directing that the patent be revoked or that registration of the trade mark, copyright or industrial design be expunged.

ere no order
e made

(2) No order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents,

trade marks, copyrights or industr
designs to which Canada is a party.

Orders in respect of interlocking management

31.75 (1) Where, on application by t
Competition Policy Advocate, and af
affording every person against whom
order is sought a reasonable opportunity
be heard, the Board finds that

(*a*) a person is a director or officer
each of two or more corporations, or

(*b*) a person holds an office mention
in paragraph (*a*) in one or more corp
rations and the other office mention
in paragraph (*a*) in one or more oth
corporations,

and the Board also finds that competiti
in the production or supply of a product
or to any market is or is likely to
thereby substantially lessened or th
sources of supply or outlets for sales are
are likely to be thereby foreclosed to cor
petitors of those corporations, the Boa
may make an order directed to that pers
prohibiting him from continuing to ho
any such office in more than one of th
corporations or in more than such of th
corporations as are named in the order.

Limitation

(2) This section does not apply
respect of offices held in corporations th
are affiliated within the meaning of su
sections 38(7) and (7.1).

Definitions

(3) For the purposes of this section,

"director"

"director" means a person occupying th
position of director by whatever nam
called;

"officer"

"officer" means the chairman or vic
chairman of the board of directors, th
president, vice-president, secretary, trea
surer, comptroller, general manage
managing director or any othe
individual who performs functions for
corporation similar to those normall
performed by an individual occupyin
any such office.

Definitions

31.76 (1) For the purposes of th
section,

"specialization agreement" means an agreement in which each party thereto agrees to discontinue producing an article in the production of which he is engaged at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article in the production of which he is engaged at the time the agreement is entered into, and includes such an agreement in which the parties also agree to buy exclusively from each other the articles that are the subject of the agreement;

"article" includes each separate type, size, weight and quality in which an article, within the meaning assigned by section 2, is produced.

(2) Where, on application by any person who has entered into or proposes to enter into a specialization agreement, and after affording the Competition Policy Advocate a reasonable opportunity to be heard, the Board finds that an agreement or proposed agreement is a specialization agreement and that

(*a*) the implementation of the agreement or proposed agreement is likely to bring about substantial gains in efficiency of production by way of savings of resources for the Canadian economy that are not reasonably attainable by means less restrictive of competition than the agreement or proposed agreement, and

(*b*) no attempts have been made by the parties to the agreement or proposed agreement to coerce any person to become a party to the agreement or proposed agreement,

subject to subsections (3) and (4), the Board may, by order, allow the agreement or proposed agreement for a period specified in the order that is not longer than five years calculated from a date specified therein or where, pursuant to subsection

(3) or (4), the allowance of the agreement

or proposed agreement is made effec after a condition described in paragr (3)(*b*) is fulfilled, for a period specifie the order that is not longer than period, not exceeding ten years, du which the series of reductions referre in the condition is to take place.

Conditional allowance

(3) Where, on an application under s section (2), the Board finds that a speci zation agreement or proposed special tion agreement meets the conditi prescribed by paragraphs (*a*) and (*b*) that subsection and that a reduction in duties of customs or other trade barr applicable to an article that is a subjec the agreement or proposed agreement remission of such duties or some other that is irreversible by the parties to agreement or proposed agreement wo prevent the agreement or proposed ag ment from lessening competition subst tially or would otherwise lessen adverse effect that the agreement or p posed agreement might have on comp tion and would not be inconsistent with purpose of the agreement or propo agreement, the Board may, by order, al the agreement or proposed agreement v such allowance to be effective only a such of the following conditions as specified in the order are fulfilled:

(*a*) an order in council is made un section 16 of the *Customs Tariff* eff ing a single reduction specified in order of the Board of any duties customs on the article;

(*b*) where the Board is satisfied that gains in efficiency arising from the s cialization agreement or proposed s cialization agreement are likely to achieved in such a manner or in s stages that a series of reductions rat than a single reduction in the duties customs on the article is desirable, order in council is made under sect 16 of the *Customs Tariff* effectin series of reductions specified in order of the Board of any duties customs on the article during a per not exceeding ten years;

(*c*) an order in council is made under section 17 of the *Financial Administration Act* effecting a remission or remissions specified in the order of the Board of any duties of customs on the article;

(*d*) trade barriers applicable to the article, other than duties of customs, are reduced in a manner specified in the order of the Board; and

(*e*) some other act specified in the order of the Board that is irreversible by the parties to the agreement or proposed agreement is done.

(4) Where, on an application under subsection (2), the Board finds that a specialization agreement or proposed specialization agreement meets the conditions prescribed by paragraphs (*a*) and (*b*) of that subsection but also finds that the agreement or proposed agreement would or would be likely to eliminate, completely or virtually, competition in the market to which it relates, the Board shall not allow the agreement or proposed agreement unless it also finds that there are in effect duties of customs or other trade barriers applicable to an article that is a subject of the agreement or proposed agreement, a reduction or remission of which would have the effect of preventing the agreement or proposed agreement from lessening competition substantially or that some other act, irreversible by the parties to the agreement or proposed agreement would have that effect, in which case the Board shall, by order, allow the agreement or proposed agreement with such allowance to be effective only after such of the conditions, referred to in paragraphs (3)(*a*) to (*e*), as would, in the opinion of the Board, achieve such effect and as are specified in the order are fulfilled.

(5) Where, on application by the Competition Policy Advocate, and after affording the parties to an allowed specialization agreement a reasonable opportunity to be

heard, the Board finds that

(*a*) the agreement has ceased to
the conditions prescribed by paragr
(2)(*a*) and (*b*), or

(*b*) the agreement is not
implemented,

the Board may, by order, revoke the al
ance of the agreement.

Allowance of modifications

(6) On application by the parties t
approved specialization agreement,
after affording the Competition P
Advocate a reasonable opportunity t
heard, the Board may, subject to sul
tion (7), by order, allow a modificatic
the agreement.

Extension of period of allowance

(7) On application by the parties
specialization agreement that was all
for a period of less than five years,
after affording the Competition P
Advocate a reasonable opportunity t
heard, the Board, may, by order, ex
the period for which the agreemer
allowed but the aggregate of the perio
which the agreement was allowed an
all extensions granted under this sul
tion in respect thereof may not exceed
years.

Register of allowed specialization agreements

(8) The Board shall cause to be m
tained at its principal office a registe
specialization agreements, proposed
cialization agreements and modificat
of specialization agreements that h
been allowed by the Board and the all
ances of which have not been revoked
such register shall be kept open to ins
tion by any person during normal busi
hours of the Board.

Orders in respect of price differentiation

31.77 (1) Subject to subsection
where, on application by the Competi
Policy Advocate, and after affording ev
person against whom an order is soug
reasonable opportunity to be heard,
Board finds that

(*a*) any supplier of an article is eng
ing in a practice of supplying the art

to different customers who are in competition with each other at prices which differ according to the different quantities purchased by them from the supplier,

(*b*) the supplier referred to in paragraph (*a*) is a major supplier in a market or is one of the suppliers in a market where the practice is widespread, and

(*c*) the practice has impeded, or is likely to impede, substantially, the expansion of an efficient firm, or a firm that, but for the practice, would be a strong competitor in a market,

the Board may make an order directed to the supplier prohibiting him from engaging in future in the practice unless it is based on an assessment described in subsection (2).

(2) No order may be made against a supplier under this section where the Board is satisfied by that supplier that the practice described in paragraph (1)(*a*) that is engaged in by him is based on a reasonable assessment of the difference in the actual or anticipated cost of supplying customers in different quantities and under different terms and conditions of delivery.

31.78 Where, on an application under this Part, the Board is of the opinion that a person other than the applicant or a person against whom an order is sought is likely to be substantially affected by reason of any order that the Board might make as a result of the application or by reason of the refusal of the Board to make an order, the Board may afford that other person a reasonable opportunity to be heard thereon and take his representations into account in deciding whether or not to make an order and on the terms of any order.

31.79 In making any order that it is empowered by this Part to make, the Board shall make the order in such terms as will, in its opinion, achieve the purpose

for which it is intended while interferin
the least possible extent with rights
any person to whom the order is dire
or any other person affected by the o
might have but for the order."

Court of record

31.8 (1) For the purposes of this Part, the Commission is a court of record.

"**31.8** (1) The Board is a court of re
and shall have an official seal which
be judicially noticed.

Hearings

(1.1) Notwithstanding subsection
the Board is not bound by any lega
technical rules of evidence in conducti
hearing and all proceedings before
Board shall be dealt with by the Boar
informally and expeditiously as the
cumstances and considerations of fair
will permit.

Inadmissible evidence

(1.2) Nothing in this Act shall be ir
preted as permitting the admission in
dence in proceedings before the Boar
anything that would be inadmissible
court by reason of any privilege under
law of evidence.

Reasons

(1.3) The Board may, and at the req
of a party to any proceedings befor
shall, give reasons in relation to its d
sion in respect of the proceedings."

Burden of proof

(2) In all applications to the Commission under this Part, the burden of proof is upon the person making the application.

Evidence

(3) In all applications to the Commission under this Part for an order, any person against whom the order is sought is entitled to cross-examine witnesses called by the Director and to call and examine witnesses and produce documents on his own behalf. **1974-75-76, c. 76, s. 12.**

Right of intervention

"(4) The Attorney General of a p
ince may intervene in any proceed
before the Board for the purpose
making representations on behalf of
province."

ion or
on of

31.9 Where, on application by the Director, or a person against whom an order has been made under this Part and after affording the Director and that person a reasonable opportunity to be heard, the Commission finds that at the time of the application the circumstances that led to the making of the order have changed and in the circumstances that exist at that time the order would not have been made or is ineffective to achieve its intended purpose, the Commission may rescind or vary the order accordingly. 1974-75-76, c. 76, s. 12.

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ation

"**31.91** (1) No application may be made by the Competition Policy Advocate to the Board for an order or recommendation under any of sections 31.2 to 31.77 unless the Competition Policy Advocate, on *ex parte* application made to a member of the Board under this section, satisfies such member that a *prima facie* case exists for the making of an order or recommendation of the nature that the Competition Policy Advocate proposes to apply for and such member certifies in writing to the Competition Policy Advocate that he has been so satisfied.

ion final

(2) A decision of a member of the Board on an application made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with by any court.

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tion of
cation

(3) The Board, on an application made to it for an order or recommendation under any of sections 31.2 to 31.77 may, after affording the parties thereto a reasonable opportunity to be heard, permit any amendment or variation of the application that it considers to be reasonable, including an amendment to vary the remedy or remedies applied for, notwithstanding that such amendment or variation was not considered by a member of the Board on the application under this section in relation to the same matter; and an order or recommendation of the Board is not subject to review or to be restrained, prohibited, removed, set aside or otherwise

dealt with by any court on the ground th
the order or recommendation does not co
form with the order or recommendatio
that was considered by a member of t
Board on the application under this sectio
in relation to the same matter."

PART V

OFFENCES IN RELATION TO COMPETITION [1974-75-76, c. 76, s. 13]

Conspiracy

32. (1) Every one who conspires, combines, agrees or arranges with another person

(*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(*b*) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,

(*c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or

(*d*) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

Idem

(1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(2) Subject to subsection (3), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

(*a*) the exchange of statistics,

(*b*) the defining of product standards,

(*c*) the exchange of credit information,

(*d*) the definition of terminology used in a trade, industry or profession,

(*e*) cooperation in research and development,

(*f*) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media,

(*g*) the sizes or shapes of the containers in which an article is packaged,

(*h*) the adoption of the metric system of weights and measures, or

(*i*) measures to protect the environment.

(3) Subsection (2) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

(*a*) prices,

(*b*) quantity or quality of production,

(*c*) markets or customers, or

(*d*) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

(4) Subject to subsection (5), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

"(4) Subject to subsection (5), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement that is in question in the prosecution relates only to

(*a*) the export of products from Canada;

(*b*) deposits made outside Canada by a

person outside Canada;

(*c*) loans made outside Canada to person outside Canada; or

(*d*) any service not referred to in paragraph (*b*) or (*c*) that is performed outside Canada for a person outside Canada and that is to be paid for by person outside Canada.

Exception

(5) Subsection (4) does not apply if the conspiracy, combination, agreement or arrangement

(*a*) has resulted or is likely to result in a reduction or limitation of the volume of exports of a product;

(*b*) has restrained or injured or is likely to restrain or injure the export business of any domestic competitor who is not a party to the conspiracy, combination, agreement or arrangement;

(*c*) has restricted or is likely to restrict any person from entering into the business of exporting products from Canada; or

(*d*) has lessened or is likely to lessen competition unduly in relation to a product in the domestic market.

(5) Subsection (4) does not apply if t conspiracy, combination, agreement arrangement that is in question in a pro ecution under subsection (1)

(*a*) is contrary to any agreement in which Canada has entered with a other country relating to private restr tions on international trade;

(*b*) has restrained or injured or is like to restrain or injure the export busine of any domestic competitor who is not party to the conspiracy, combinatio agreement or arrangement;

(*c*) has restricted or is likely to restr any person from entering into the bu ness of exporting products from Canad

(*d*) has lessened or is likely to less competition unduly in relation to a pro uct in the domestic market; or

(*e*) has resulted or is likely to result in reduction or limitation of the value exports from Canada of a product.

Interpretation

(5.1) An agreement or arrangement which subsection (4) applies does n lessen competition unduly within t meaning of paragraph (5)(*d*) only becau it has an adverse effect on prices in t domestic market, if such effect is uni tended and is ancillary to the prima objectives of the agreement or arrang ment."

Defences

(6) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(*a*) in the practice of a trade or profession relating to such service; or

(*b*) in the collection and dissemination of information relating to such service.

(7) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate as that relationship is defined in subsections 38(7) and (7.1). R.S., c. C-23, s. 32; 1974-75-76, c. 76, s. 14.

32.1 (1) Any company, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the company or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the company, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in violation of section 32, is, whether or not any director or officer of the company in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court.

"**32.1** (1) This section applies only in respect of conspiracies, combinations, agreements and arrangement whereby one or more persons who carry on business in Canada conspire, combine, agree, or arrange with a person or persons who carry on business outside Canada to

(*a*) restrict the importation of a product into Canada;

(*b*) restrict the exportation of a product from Canada; or

(*c*) adversely affect competition in Canada in a manner otherwise than as described in paragraph (*a*) or (*b*).

(2) Every one who is a party to a conspiracy, combination, agreement or arrangement to which this section applies is guilty of an indictable offence and is liable to a fine in the discretion of the court or to imprisonment for five years or to both.

(3) Notwithstanding subsection (1), this section does not apply in respect of an agreement or arrangement

(*a*) that is specifically authorized by an Act of Parliament; or

(*b*) that is entered into only by persons, each of whom is an affiliate, as that

relationship is defined in subsectio
38(7) and (7.1), of every other pers
who is a party to the agreement
arrangement.

Defence

(4) In a prosecution under this sectio
the Court shall not convict a person
persons who carry on business in Canad
where that person or those persons satis
the Court that they do not, individually
collectively, account for fifty per cent
more of the production or supply
Canada of the product in relation to whic
the prosecution was brought against th
person or those persons.

Foreign directives

32.11 (1) Any corporation that carri
on business in Canada and that impl
ments, in whole or in part in Canada,
directive, instruction, intimation of poli
or other communication to the corporati
or any person from a person in a countr
other than Canada who is in a position
direct or influence the policies of the co
poration, which communication is for th
purpose of giving effect in Canada to
conspiracy, combination, agreement
arrangement wherever entered into th
has an objective described in any of para
graphs 32(1)(*a*) to (*d*) is, whether or n
any director or officer of the corporati
in Canada has knowledge of the conspi
acy, combination, agreement or arrang
ment, guilty of an indictable offence and
liable to a fine in the discretion of th
court."

Limitation

(2) No proceedings may be commen
under this section against a particular c
pany where an application has been made
the Director under section 31.6 for an o
against that company or any other per
based on the same or substantially the s
facts as would be alleged in proceedi
under this section. 1974-75-76, c. 76, s. 15.

Definition of "bid-rigging"

32.2 (1) In this section, "bid-rigging" means

(*a*) an agreement or arrangement between or among two or more persons whereby one

or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, and

(*b*) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

(2) Every one who is a party to bid-rigging is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for five years or to both.

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate as that relationship is defined in subsections 38(7) and (7.1). 1974-75-76, c. 76, s. 15.

32.3 (1) Every one who conspires, combines, agrees or arranges with another person

(*a*) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(*b*) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for five years or to both..

(2) In determining whether or not an agreement or arrangement violates subsection (1),

the court before which such a violation is alleged shall have regard to

(*a*) whether the sport in relation to which the violation is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(*b*) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

Application

(3) This section applies, and section 32 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of such teams and clubs where such agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 32 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among such teams, clubs and persons. 1974-75-76, c. 76, s. 15.

Definition of "monopoly"

33. Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years. 1960, c. 45, s. 13.

"**33.** (1) For the purposes of this s
tion, "monopoly" means a situation wh
one or more persons substantially con
throughout Canada or any area thereo
class or species of business in which t
are engaged.

Illegal monopoly

(2) A monopoly is illegal when the pa
or parties thereto have, by any mea
operated the business or busines
through which the monopoly is exerci
or are likely to operate that business
those businesses to the detriment
against the interest of the public, whet
consumers, producers or others.

Where situation not illegal monopoly

(3) A situation is not an illegal mono
ly within the meaning of subsection (2)
reason only of the exercise by the party
parties to the situation of any right

interest derived under the *Copyright Act*, the *Industrial Design Act*, the *Patent Act* or the *Trade Marks Act*.

(4) Every person who is a party or privy to or knowingly assists in, or in the formation of, an illegal monopoly is guilty of an indictable offence and is liable to imprisonment for two years.

(5) In determining whether or not an offence has been committed under this section, a court shall not exclude from consideration any evidence by reason only that such evidence is evidence of conduct that constitutes an offence under any other provision of this Act, or in respect of which an order could be made by the Board under any provision of Part IV.1.

(6) No proceedings may be commenced under this section against a particular person where an application has been made by the Competition Policy Advocate under section 31.72 or 31.73 for an order against that person based on the same or substantially the same facts as would be alleged in proceedings under this section.

34. (1) Every one engaged in a business who

(*a*) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity;

(*b*) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substan-

34. (1) Every one engaged in a business who

(*a*) is a party or privy to, or assists in, any sale or offer for sale of articles that discriminates to his knowledge, directly or indirectly between any of his customers who are in competition with each other for a share of the patronage of the same ultimate customers or between any of his customers and a person acting on behalf of persons one at least of whom is in competition with such customer for a share of the patronage of the same ultimate customers,

(*b*) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or

tially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or

(*c*) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect,

is guilty of an indictable offence and is liable to imprisonment for two years.

Where discrimination occurs

(2) It is not an offence under paragraph (1)(*a*) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

Defence

(3) Paragraph (1)(*a*) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers, the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to such members, suppliers or customers. R.S., c. C-23, s. 34; 1974-75-76, c. 76, s. 16.

Cooperative societies excepted

tendency of substantially lessening co petition or eliminating a competitor such part of Canada, or designed have such effect, or

(*c*) engages in a policy of selling pr ucts at prices abnormally low, havi the effect or tendency of substantia lessening competition or eliminating competitor, or designed to have su effect,

is guilty of an indictable offence and liable to imprisonment for two years.

(2) For the purposes of this secti discrimination occurs where any disco rebate, allowance, price concession other advantage is granted or offered one customer over and above any disco rebate, allowance, price concession other advantage that, at the time articles are sold or offered for sale to s customer, is available to each compet customer, or to a person acting on beh of persons at least one of whom is a c peting customer, on an offer to purch articles of like quality in like quan under substantially the same terms conditions of delivery.

(3) It is not an offence under this s tion to be a party or privy to, or assist any sale or offer for sale mentioned there unless the discount, rebate, allowan price concession or other advantage w granted as part of a practice of discrimi tion as described in subsection (2).

(4) This section shall not be constru to prohibit a cooperative association, cre union, caisse populaire or cooperati credit society from returning to its me bers, suppliers or customers the whole any part of the net surplus made in operations in proportion to the acquisiti or supply of articles from or to such me bers, suppliers or customers."

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35. (1) In this section, "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.

f allow- ohibited on pro- ate terms

(2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser, (which other purchasers are in this section called "competing purchasers"), is guilty of an indictable offence and is liable to imprisonment for two years.

on of ionate

(3) For the purposes of this section, an allowance is offered on proportionate terms only if

(*a*) the allowance offered to a purchaser is in approximately the same proportion to the value of sales to him as the allowance offered to each competing purchaser is to the total value of sales to such competing purchaser,

(*b*) in any case where advertising or other expenditures or services are exacted in return therefor, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of such advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to such competing purchaser, and

(*c*) in any case where services are exacted in return therefor, the requirements thereof have regard to the kinds of services that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed. R.S., c. C-23, s. 35; 1974-75-76, c. 76, s. 17.

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36. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply

or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(*a*) make a representation to the public that is false or misleading in a material respect;

(*b*) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies upon the person making the representation;

(*c*) make a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result

if such form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out; or

(*d*) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

Deemed representation to public

(2) For the purposes of this section and section 36.1, a representation that is

(*a*) expressed on an article offered or displayed for sale, its wrapper or container,

(*b*) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(*c*) expressed on an in-store or other point-

of-purchase display,

(*d*) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(*e*) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public,

shall be deemed to be made to the public by and only by the person who caused the representation to be so expressed, made or contained and, where that person is outside Canada, by

(*f*) the person who imported the article into Canada, in a case described in paragraph (*a*), (*b*) or (*e*), and

(*g*) the person who imported the display into Canada, in a case described in paragraph (*c*).

(3) Subject to subsection (2), every one who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) shall be deemed to have made that representation to the public.

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(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

ıment

(5) Any person who violates subsection (1) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. R.S., c. C-23, s. 36; 1974-75-76, c. 76, s. 18.

Representation as to reasonable test and publication of testimonials

36.1 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest

(*a*) make a representation to the public that a test as to the performance, efficacy or length of life of the product has been made by any person, or

(*b*) publish a testimonial with respect to the product,

except where he can establish that

(*c*) the representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, as the case may be, or

(*d*) the representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given, as the case may be,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

Punishment

(2) Any person who violates subsection (1) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years, or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. 1974-75-76, c. 76, s. 18.

Double ticketing

36.2 (1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,

(*a*) on the product, its wrapper or container;

(*b*) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product

is mounted for display or sale; or

(*c*) on an in-store or other point-of-purchase display or advertisement.

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(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for one year or to both. 1974-75-76, c. 76, s. 18.

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36.3 (1) For the purposes of this section, "scheme of pyramid selling" means

(*a*) a scheme for the sale or lease of a product whereby one person (the "first" person) pays a fee to participate in the scheme and receives the right to receive a fee, commission or other benefit

(i) in respect of the recruitment into the scheme of other persons either by the first person or any other person, or

(ii) in respect of sales or leases made, other than by the first person, to other persons recruited into the scheme by the first person or any other person; and

(*b*) a scheme for the sale or lease of a product whereby one person sells or leases a product to another person (the "second" person) who receives the right to receive a rebate, commission or other benefit in respect of sales or leases of the same or another product that are not

(i) sales or leases made to the second person,

(ii) sales or leases made by the second person, or

(iii) sales or leases, made to ultimate consumers or users of the same or other product, to which no right of further participation in the scheme, immediate or contingent, is attached.

mid selling

(2) No person shall induce or invite another person to participate in a scheme of pyramid selling.

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(3) Any person who violates subsection (2) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

Where pyramid selling permitted by province

(4) This section does not apply in respect of a scheme of pyramid selling that is licensed or otherwise permitted by or pursuant to an Act of the legislature of a province. 1974-75-76, c. 76, s. 18.

Definition of "scheme of referral selling"

36.4 (1) For the purposes of this section, "scheme of referral selling" means a scheme for the sale or lease of a product whereby one person induces another person (the "second" person) to purchase or lease a product and represents that the second person will or may receive a rebate, commission or other benefit based in whole or in part on sales or leases of the same or another product made, other than by the second person, to other persons whose names are supplied by the second person.

Referral selling

(2) No person shall induce or invite another person to participate in a scheme of referral selling.

Punishment

(3) Any person who violates subsection (2) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

Where referral selling permitted by a province

(4) This section does not apply in respect of a scheme of referral selling that is licensed or otherwise permitted by or pursuant to an Act of the legislature of a province. 1974-75-76, c. 76, s. 18.

Definition of "bargain price"

37. (1) For the purposes of this section, "bargain price" means

(*a*) a price that is represented in an advertisement to be a bargain price, by reference to an ordinary price or otherwise; or

(*b*) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily sold.

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(2) No person shall advertise at a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

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(3) Subsection (2) does not apply to a person who establishes that

(*a*) he took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated;

(*b*) he obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed his reasonable expectations; or

(*c*) after he became unable to supply the product in accordance with the advertisement, he undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.

nishment

(4) Any person who violates subsection (2) is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for one year or to both. R.S., c. C-23, s. 37; 1974-75-76, c. 76, s. 18.

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dvertised price

37.1 (1) No person who advertises a product for sale or rent in a market shall, during

the period and in the market to which the advertisement relates, supply the product at a price that is higher than the price advertised.

Punishment

(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for one year or to both.

Saving

(3) This section does not apply

(*a*) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained therein are subject to error if the person establishes that the price advertised is in error;

(*b*) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement; or

(*c*) in respect of the sale of a security obtained on the open market during a period when the prospectus relating to that security is still current.

(*b*) in respect of an advertisement tha immediately followed by another ad tisement correcting the price mentione the first advertisement;

(*c*) in respect of the sale of a secu obtained on the open market durin period when the prospectus relating to t security is still current; or

"(*d*) in respect of the sale of a produc by or on behalf of a person who is nc engaged in the business of dealing i that product."

Application

(4) For the purpose of this section, the market to which an advertisement relates shall be deemed to be the market to which the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise. 1974-75-76, c. 76, s. 18.

Promotional contests

37.2 (1) No person shall, for the purpose of promoting, directly or indirectly, the sale of a product, or for the purpose of promoting, directly or indirectly, any business interest, conduct any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise dispose of any product or other benefit by any mode of chance, skill or mixed chance

and skill whatever unless such contest, lottery, game or disposal would be lawful except for this section and unless

(*a*) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning;

(*b*) distribution of the prizes is not unduly delayed; and

(*c*) selection of participants or distribution of prizes is made on the basis of skill or on a random basis in any area to which prizes have been allocated.

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(2) Any person who violates subsection (1) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. 1974-75-76, c. 76, s. 18.

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37.3 (1) Sections 36 to 37.2 do not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada, where he establishes that he obtained and recorded the name and address of that other person and that he accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his business.

nitation

(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

(*a*) the act or omission giving rise to the offence with which he is charged was the result of error;

(*b*) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

(*c*) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(*d*) the measures referred to in paragraph (*c*), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

Exception

(3) Subsection (2) does not apply in respect of a person who, in Canada, on behalf of a person outside Canada, makes a representation to the public or publishes a testimonial. 1974-75-76, c. 76, s. 18.

Price maintenance

38. (1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade mark, copyright or registered industrial design shall, directly or indirectly,

(*a*) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(*b*) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

Exception

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated companies or directors, agents, officers or employees of

(*a*) the same company, partnership or sole proprietorship, or

(*b*) companies, partnerships or sole proprietorships that are affiliated,

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

ed retail

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

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(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

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(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or without Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

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(7) For the purposes of subsection (2),

(*a*) a company is affiliated with another company if

(i) one is a subsidiary of the other,

(ii) both are subsidiaries of the same company,

(iii) both are controlled by the same person, or

(iv) each is affiliated with the same company; and

(*b*) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person.

Where company is deemed to be controlled

(7.1) For the purposes of this section, a company is deemed to be controlled by a person if shares of the company carrying voting rights sufficient to elect a majority of the directors of the company are held, other than by way of security only, by or on behalf of that person.

Punishment

(8) Every person who violates subsection (1) or (6) is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for five years or to both.

Where no unfavourable inference to be drawn

(9) Where, in a prosecution under paragraph (1)(*b*), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

(*a*) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(*b*) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling such products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(*c*) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(*d*) that the other person made a practice of

not providing the level of servicing that purchasers of such products might reasonably expect from such other person. R.S., c. C-23, s. 38; 1974-75-76, c. 76, s. 18.

"**38.1** (1) No supplier of an article, in dealing with one of his customers, shall refuse such customer sale and delivery of the article at any locality at which the supplier makes delivery of the article to any other of his customers, on the same terms and conditions of sale and delivery that would be available to the first-mentioned customer if his place of business were located in that locality.

(2) No supplier of an article shall refuse to deal with a customer or a person seeking to become a customer by reason only that such customer or person insists on taking delivery of the article at a particular locality at which the supplier sells and delivers the article to other customers.

(3) Any person who violates this section is guilty of an indictable offence and is liable to imprisonment for two years."

39. Except as otherwise provided in this Part, nothing in this Part shall be construed to deprive any person of any civil right of action. R.S. c. C-23, s. 39; 1974-75-76, c. 76, s. 18.

"PART V.I

CLASS AND SUBSTITUTE ACTIONS

39.1 In this Part,

"class" means a class of persons each of whom has a cause of action under section 31.1 against the same person or persons;

"class action" means proceedings commenced under section 39.11 and ordered, pursuant to section 39.12, to be maintained as a class action;

"Court"

"Court" means the Federal Court-Tri Division or any superior court in whic concurrent jurisdiction with the Feder Court-Trial Division has been vested b a proclamation issued pursuant to se tion 39.23.

Class action

39.11 (1) One or more members of class may, on behalf of all members of t class, commence proceedings in a Cou having jurisdiction where that person those persons reside on any grou referred to in subsection 31.1(1) for reli referred to in that subsection, other th recovery of the cost of any investigati and of proceedings under section 31.1, a for any supplementary or alternati remedy or relief referred to in subsecti (1.1) of that section.

Provisions applicable

(2) Subsections 31.1(2) and (4) appl with such modifications as the circu stances require, in respect of proceedin commenced under this section.

Application for order approving class action

39.12 (1) Forthwith after the co mencement of proceedings under secti 39.11, the person or persons commenci the proceedings shall, on notice to ea person against whom any remedy or rel is sought in the proceedings, to the Co petition Policy Advocate and, if the Cou so orders, to the members of the cla purported to be represented, apply to t Court in which the proceedings were co menced for an order that the proceedin be maintained as a class action.

Where order to be granted

(2) On an application made pursuant subsection (1), the Court shall order th the proceedings to which the applicati relates be maintained as a class action if finds that

(*a*) the members of the class purport to be represented by the person or p sons who commenced the proceedin are so numerous that joinder of all su members as party plaintiffs impracticable;

(*b*) there are questions of law or fa that appear to be common to the cau of action of the members of the class;

(*c*) the person or persons who commenced the proceedings will fairly and adequately represent the interests of the class;

(*d*) the proceedings are brought in good faith on the basis of a *prima facie* case; and

(*e*) a class action is superior to any other available method for the fair and efficient adjudication of the issues to be determined between the members of the class and the person or persons against whom the proceedings were commenced.

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(3) In determining for the purposes of an application made pursuant to subsection (1) whether a class action is superior to any other available method for the fair and efficient adjudication of issues to be determined between members of the class in question and the person or persons against whom the proceedings in question were commenced, a Court shall consider

(*a*) whether the questions of law or fact that appear to be common to the causes of action of the members of the class predominate over any questions affecting only individual members; and

(*b*) where appropriate, whether there are a sufficient number of members of the class who are likely to have suffered a significant quantum of loss or damage to warrant the cost of administering the relief claimed in the proceedings.

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to be denied

(4) On an application made pursuant to subsection (1), the Court shall not refuse to order that the proceedings to which the application relates be maintained as a class action on the grounds only that

(*a*) the only relief claimed is compensation for loss or damage suffered;

(*b*) any compensation for loss or damage suffered that is awarded to members of the class will have to be determined or calculated on an individual basis for each member of the class; or

(*c*) the relief claimed arises out of separate contracts made or transactions that took place between members of the class

and the person or persons against whom the proceedings were commenced or out of separate instance of conduct or failure on the part of that person or those persons.

Content of order

(5) An order that proceedings be maintained as a class action shall

(*a*) define the class on whose behalf the action is to be maintained;

(*b*) describe briefly the nature of the claim made and of the relief sought;

(*c*) set forth the questions of law or fact that appear to be common to the causes of action of members of the class; and

(*d*) specify a date before which members of the class may give notice to the Court of their wish to be excluded from the class action.

Reasons to be given

(6) A Court, in making an order or refusing to make an order that proceedings be maintained as a class action, shall state the reasons for its decision including its reasoning and conclusions in respect of the matters referred to in subsection (3).

Where proceedings not to be class action

(7) Proceedings commenced under section 39.11 may not be maintained as a class action unless, on an application made pursuant to subsection (1), a Court order that those proceedings be so maintained.

Appeal

(8) For the purpose of an appeal, an order of a Court that proceedings be maintained as a class action or a refusal to make such an order is a final judgment of the Court.

Judgment

39.13 (1) Where, at the trial of a class action, the Court makes a finding against any person against whom the proceedings were commenced on the questions of law or fact common to the causes of action of members of the class in question, the Court

(*a*) shall, if a claim has been made in the proceedings for compensation for loss or damage suffered by members of the class, give judgment therefor for each member of the class; and

(*b*) may grant any other remedy or relief applied for in the proceedings, whether by way of injunction or otherwise, that the Court by reason of its general jurisdiction has authority to grant and that the Court considers to be appropriate in the circumstances.

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(2) The amount of compensation to which each member of a class in whose favour a judgment is given pursuant to paragraph (1)(*a*) is entitled as a result of such judgment may be determined by the Court giving the judgment and set forth in the judgment or, where the Court so orders, may be determined in accordance with procedures provided by regulations made pursuant to this Part, the Rules of the Court and any special directions set forth in the order that are not inconsistent with this Part, those regulations and those Rules.

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39.14 (1) Where, on an application under subsection 39.12(1), the Court refuses to make an order that proceedings be maintained as a class action on the ground only that, by reason of the matters mentioned in paragraph 39.12(3)(*b*), a class action would not, in the circumstances of the particular proceedings before it, be superior to any other available method for the fair and efficient adjudication of the issues to be determined between members of the class in question and the person or persons against whom the proceedings in question were commenced, the Competition Policy Advocate may, subject to subsection (2), commence a substitute action in respect of the class in question against that person or those persons in a Court having jurisdiction where any members of the class reside for any remedy or relief that was sought or might have been sought in the proceedings in question that were commenced under section 39.11.

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(2) No proceedings may be commenced under subsection (1),

(*a*) in the case of proceedings based on conduct that is contrary to any provision of Part V, after the expiration of six

months from the day on which the Court refused to make an order under section 39.12 in respect of proceedings commenced under section 39.11 on the basis of the same conduct or after the expiration of the period of two years referred to in paragraph 31.1(4)(*a*), whichever is the later; and

(*b*) in the case of proceedings based on the failure of any person to comply with an order of the Board or a court, after the expiration of six months from the day on which the Court refused to make an order under section 39.12 in respect of proceedings commenced under section 39.11 on the basis of the same failure or after the expiration of the period of two years referred to in paragraph 31.1(4)(*b*), whichever is the later.

Judgment

39.15 (1) Where, at the trial of a substitute action, the Court makes a finding against any person against whom the proceedings were commenced on the question of law or fact common to the causes of action of members of the class in question unless that person has been convicted of an offence against this Act or an order has been made against him under any provision of Part IV.1 on the basis of the same or substantially the same facts on which the finding of the Court is based, the Court

(*a*) shall, if a claim has been made in the proceedings for compensation for loss or damage suffered by members of the class and if the minimum amount of money for which that person is likely to be liable to all members of the class can be determined and is substantial, determine as nearly as may be the total amount of that liability and give judgment for the Competition Policy Advocate against that person for that amount; and

(*b*) may grant any other remedy or relief applied for in the proceedings whether by way of injunction or otherwise, that the Court by reason of its

general jurisdiction has authority to grant and that the Court considers to be appropriate in the circumstances.

(2) Any amount recovered by the Competition Policy Advocate under a judgment given pursuant to subsection (1) belongs to Her Majesty in right of Canada and shall be paid by the Competition Policy Advocate into the Consolidated Revenue Fund.

39.16 Where an order is made under section 39.12 that proceedings be maintained as a class action, or the Competition Policy Advocate commences a substitute action, the Court may, by order, direct that notice of the proceedings be given to members of the class in question, in accordance with regulations made pursuant to this Part, the Rules of the Court and any special directions set forth in the order that are not inconsistent with this Part, those regulations and those Rules, advising them of the proceedings and further advising them that the Court will exclude them from the proceedings if they give notice to the Court of their wish to be so excluded before a date specified in the order and notice.

39.17 (1) A Court shall exclude from a class action or substitute action those members of the class in question who,

(*a*) pursuant to an order made under section 39.12 or a notice given under section 39.16, give notice to the Court before the date specified in the order or notice of their wish to be so excluded, and

(*b*) where no notice is given under section 39.16, at any time before judgment is given in a substitute action, give notice to the Court of their wish to be so excluded,

and the rights of a person so excluded as against the person or persons against whom the class action or substitute action was commenced are not affected by the action or by the result thereof.

Idem

(2) Where a member of a class i respect of which a class action is ordere to be maintained under section 39.12, or member of a class in respect of which th Competition Policy Advocate has com menced a substitute action, has com menced an action in a court other than th Court in which the class action wa ordered to be maintained or the substitut action was commenced in respect of th same conduct or failure that is alleged i the class or substitute action and has n been excluded from the class or substitut action pursuant to subsection (1), th Court may, on application by any perso against whom the class action was ordere to be maintained or the substitute actio was commenced, exclude such membe from the class or substitute action wit like effect as if he had been exclude under subsection (1).

Effect of judgment on members of class

39.18 Except as provided in the judg ment in a class action as it provides f subsequent determination of the amount compensation for loss or damage suffere by members of the class or any oth issues, the judgment in a class action substitute action constitutes a final judg ment between each member of the class question who was not excluded from th class pursuant to section 39.17 and eac person against whom the class action substitute action was taken with respect the conduct or failure alleged in th action.

Discontinuation or compromise

39.19 A class action shall not be disco tinued or compromised without th approval of the Court that ordered it to maintained.

Costs

39.2 (1) No costs shall be awarded any party to a class action at any stage the proceedings, including an appea except

(*a*) on an application under secti 39.12;

(*b*) on a settlement of any matter me

tioned in paragraph 39.22(1)(*d*) under procedures referred to in that paragraph;

(*c*) on an interlocutory motion; and

(*d*) in proceedings based on the same or substantially the same facts on which the defendant was convicted of an offence against this Act.

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(2) Where, in a class action, judgment is given in favour of the members of the class, the reasonable solicitor and client costs of the member or members of the class who commenced the proceedings, including costs of any appeal, as determined by the Court that ordered the proceedings to be maintained as a class action or by the court hearing the appeal, as the case may be, constitute a first charge, on a *pro rata* basis, against amounts ordered to be paid as compensation for loss or damage suffered to members of the class in the proceedings or in any subsequent proceedings arising out of the class action.

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39.21 Where, in a class action, judgment is given in favour of the members of the class and the judgment does not determine all questions of law and all questions of fact that affect individual members of the class or the amount of any relief to which members of the class are entitled as compensation for loss or damage suffered, in any subsequent proceedings arising out of the class action

(*a*) members of the class and persons against whom the class action was taken have the same rights of discovery against each other and are subject to the same liability for costs as in an ordinary civil action; and

(*b*) the persons against whom the class action was taken have the same right to

pay money into court as has the defendant in an ordinary civil action.

gulations

39.22 (1) The Governor in Council may make regulations

(*a*) regulating the practice and proce-

dure in respect of class and substitute actions including the prescription of times within which and the manner in which any matters relating thereto must be done;

(*b*) providing for the manner of consolidation or otherwise dealing with concurrent actions;

(*c*) prescribing matters to be considered by a court in determining

(i) whether notice of a class action should be given under section 39.16, and

(ii) the terms of any such notice and the manner in which it should be given;

(*d*) prescribing procedures to be followed in settling questions of law or fact that relate to individual members of a class, to the rights of such members and to any relief to which they are entitled, when judgment is given for members of the class in a class action;

(*e*) prescribing procedures to be followed to give effect to subsection 39.2(2); and

(*f*) generally to carry out the purposes and provisions of this Part.

Publication of proposed regulations

(2) Subject to subsection (3), the Minister shall cause to be published in the *Canada Gazette* a copy of each regulation that the Governor in Council proposes to make under subsection (1) and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

Exception

(3) The Minister is not required to publish a regulation that the Governor in Council proposes to make under subsection (1) if it has previously been published pursuant to subsection (2), whether in the same form or in a form that has been amended as a result of representations made by interested persons.

Rules of Court

(4) Nothing in this Part restricts the authority of a Court or of the judges of a

Court to make rules and orders not inconsistent with this Part and regulations made pursuant to subsection (1).

39.23 Where the Attorney General of Canada reports to the Governor in Council that agreement has been reached between or among

(*a*) attorneys general of two or more provinces where no proclamation has previously been issued under this section, or

(*b*) the attorney general of a province or the attorneys general of two or more provinces and the attorneys general of all provinces in relation to which a proclamation has previously been issued under this section,

on principles of administration and consolidation of class actions ordered to be maintained by superior courts of those provinces and on the principles of administration of subsequent proceedings arising out of those class actions and that agreement has been reached on the manner in which those principles will be implemented by regulations made pursuant to section 39.22 or by uniform rules and orders of courts, the Governor in Council shall issue a proclamation vesting in the superior courts that ordinarily exercise original jurisdiction in those provinces in a case described in paragraph (*a*) and in the province or provinces in relation to which a proclamation has not previously been issued under this section in a case described in paragraph (*b*), concurrent jurisdiction with the Federal Court-Trial Division in respect of proceedings under this Part."

PART VI

OTHER OFFENCES

Punishment for failure to attend, etc.

40. If any person, who has been duly served with an order, issued by the Commission or any member thereof requiring him to attend or to produce any books, papers, records or other documents, and to whom, at the time of service, payment or tender has been made of his reasonable travelling expenses according to the scale in force with respect to witnesses in civil suits in the superior court of the province in which such person is summoned to attend, fails to attend and give evidence, or to produce any book, paper, record or other document as required by the said order, he is, unless he shows that there was good and sufficient cause for such failure, guilty of an offence and liable upon summary conviction to a fine of not more than one thousand dollars or to imprisonment for a term not exceeding six months or to both. R.S., c. 314, s. 36.

"**40.** (1) If any person who has be duly served with an order issued by t Board or any member thereof requiri him to attend or to produce any book papers, records or other documents other things and to whom, at the time service, payment or tender has been ma of his reasonable travel expenses accordi to the scale in force with respect to wi nesses in civil suits in the superior court the province in which such person is sun moned to attend, fails to attend and gi evidence, or to produce any book, pape record or other document or other thing required by the said order, he is, unless h shows that there was good and sufficie cause for such failure, guilty of an offen and liable on summary convinction to fine of one thousand dollars or to impri onment for six months or to both.

Failure to observe claim of privilege or confidentiality

(2) Any person who contravenes su section 27(3) or 27.1(3) ia guilty of offence and liable on summary convicti to a fine of one thousand dollars or imprisonment for six months or to both."

Obstruction

41. (1) No person shall in any manner impede or prevent or attempt to impede or prevent any inquiry or examination under this Act.

Penalty

(2) Every person who violates subsection (1) is guilty of an offence and is liable on summary conviction or on conviction on indictment to a fine of not more than five thousand dollars or to imprisonment for a term not exceeding two years or to both. R.S., c. 314, s. 37.

Penalty for violation of ss. 10(2)

42. (1) Every person who violates subsection 10(2) is guilty of an offence and is liable

on summary conviction or on conviction on indictment to a fine of not more than five thousand dollars or to imprisonment for a term not exceeding two years or to both.

for failomply tice . 9 or ss.

(2) Every person who, without good and sufficient cause, the proof whereof lies on him, refuses, neglects or fails to comply with a notice in writing requiring a written return under oath or affirmation, pursuant to section 9 or subsection 22(2) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine of not more than five thousand dollars or to imprisonment for a term not exceeding two years or to both.

ity of ors assent- offences

(3) Where a corporation commits an offence against subsection (1) or (2) any director or officer of such corporation who assents to or acquiesces in the offence committed by the corporation is guilty of that offence personally and cumulatively with the corporation and with his co-directors or associate officers. R.S., c. 314, s. 38.

lty for fail- comply notice r ss. 12(1)

43. Every person who, without good and sufficient cause, the proof whereof lies on him, refuses, neglects or fails to comply with a notice in writing requiring evidence upon affidavit or written affirmation, pursuant to subsection 12(1) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine of not more than five thousand dollars or to imprisonment for a term not exceeding two years or to both. R.S., c. 314, s. 39.

Procedure

cedure for rcing penal-

44. (1) Where an indictment is found against an accused, other than a corporation, for any offence against this Act, the accused may elect to be tried without a jury and where he so elects he shall be tried by the judge presiding at the court at which the

indictment is found, or the judge presiding at any subsequent sittings of that court, or at any court where the indictment comes on for trial; and in the event of such election being made the proceedings subsequent to the election shall be regulated in so far as may be applicable by the provisions of the *Criminal Code* relating to the trial of indictable offences by a judge without a jury.

Jurisdiction of courts

(2) No court other than a superior court of criminal jurisdiction, as defined in the *Criminal Code*, has power to try any offence under section 32, 32.1, 32.2, 32.3 or 33.

Corporations to be tried without jury

(3) Notwithstanding anything in the *Criminal Code* or in any other statute or law, a corporation charged with an offence under this Act shall be tried without the intervention of a jury.

Option as to procedure under ss. 30(2)

(4) In any case where subsection 30(2) is applicable the Attorney General of Canada or the attorney general of the province may in his discretion institute proceedings either by way of an information under that subsection or by way of prosecution.

Proceedings

(5) Proceedings in respect of an offence that is declared by this Act to be punishable on summary conviction may be instituted at any time within two years after the subject-matter of the proceedings arose. R.S., c. C-23, s. 44; 1974-75-76, c. 76, s. 19.

Venue of prosecutions

44.1 Notwithstanding any other Act, a prosecution for an offence under Part V or section 46.1 may be brought, in addition to any place in which such prosecution may be brought by virtue of the *Criminal Code*,

(*a*) where the accused is a company, in any territorial division in which the company has its head office or a branch office, whether or not such branch office is provided for in any Act or instrument relating to the incorporation or organization of the company; and

(*b*) where the accused is not a company, in any territorial division in which the accused resides or has a place of business. 1974-75-76, c. 76, s. 20.

finitions

45. (1) In this section

gent of a participant"

"agent of a participant" means a person who by a document admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

ocument"

"document" includes any document appearing to be a carbon, photographic or other copy of a document;

articipant"

"participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

vidence against participant

(2) In any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act,

(*a*) anything done, said or agreed upon by an agent of a participant shall *prima facie* be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;

(*b*) a document written or received by an agent of a participant shall *prima facie* be deemed to have been written or received, as the case may be, with the authority of that participant; and

(*c*) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the document and its contents,

(ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of a participant, that it was done, said or agreed upon with the au-

thority of that participant,

(iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant. R.S., c. C-23, s. 45; 1974-75-76, c. 76, s. 21.

Admissibility of statistics

45.1 (1) A collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of

(*a*) the *Statistics Act*, or

(*b*) any other enactment of Parliament or of the legislature of a province,

is admissible in evidence in any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act.

Idem

(2) On request from the Minister, the Commission or the Director,

(*a*) the Chief Statistician of Canada or an officer of any department or agency of the Government of Canada the functions of which include the gathering of statistics shall, and

(*b*) an officer of any department or agency of the government of a province the functions of which include the gathering of statistics may,

compile from his or its records a statement of statistics relating to any industry or sector thereof, in accordance with the terms of the request, and any such statement is admissible in evidence in any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act.

Privileged information not affected

(3) Nothing in this section compels or authorizes the Chief Statistician of Canada or any officer of a department or agency of the Government of Canada to disclose any particulars relating to an individual or business in a manner that is prohibited by any provision of an enactment of Parliament or of a provincial legislature designed for the protection of such particulars.

ertificate

(4) In any proceedings before the Commission, or in any prosecution or proceedings before a court under or pursuant to this Act, a certificate purporting to be signed by the Chief Statistician of Canada or the officer of the department or agency of the Government of Canada or of a province under whose supervision a record, report or statement of statistics referred to in this section was prepared, setting out that the record, report or statement of statistics attached thereto was prepared under his supervision, is evidence of the facts alleged therein without proof of the signature or official character of the person by whom it purports to be signed. 1974-75-76, c. 76, s. 22.

Statistics collected by sampling methods

45.2 A collection, compilation, analysis, abstract or other record or report of statistics collected by sampling methods by or on behalf of the Director or any other party to proceedings before the Commission, or to a prosecution or proceedings before a court under or pursuant to this Act, is admissible in evidence in any such prosecution or proceedings. 1974-75-76, c. 76, s. 22.

Notice

45.3 (1) No record, report or statement of statistical information or statistics referred to in section 45.1 or 45.2 shall be received in evidence before the Commission or court unless the person intending to produce the record, report or statement in evidence has given to the person against whom it is intended to be produced reasonable notice together with a copy of the record, report or statement and, in the case of a record or report of statistics referred to in section 45.2, together with the names and qualifications of those persons who participated in the preparation thereof.

Attendance of statistician

(2) Any person against whom a record or report of statistics referred to in section 45.1 is produced may require, for the purposes of cross-examination, the attendance of any person under whose supervision the record or report was prepared.

Idem

(3) Any person against whom a record or report of statistics referred to in section 45.2 is produced may require, for the purposes of cross-examination, the attendance of any person who participated in the preparation of the record or report. 1974-75-76, c. 76, s. 22.

Jurisdiction of Federal Court

46. (1) Subject to this section, the Attorney General of Canada may institute and conduct any prosecution or other proceedings under section 30, any of sections 32 to 35 and section 38 or, where the proceedings are on indictment, under section 36, 36.1, 36.3, 36.4, 37.2 or 46.1, in the Federal Court—Trial Division, and for the purposes of such prosecution or other proceedings the Federal Court—Trial Division has all the powers and jurisdiction of a superior court of criminal jurisdiction under the *Criminal Code* and under this Act.

"**46.** (1) Subject to this section, the Attorney General of Canada may institute and conduct any prosecution or other proceedings under section 30, any of sections 32 to 35 and sections 38 and 38.1 or, where the proceedings are on indictment, under section 36, 36.1, 36.3, 36.4, 37.2 or 46.1, in the Federal Court—Trial Division, and for the purposes of such prosecution or other proceedings the Federal Court—Trial Division has all the powers and jurisdiction of a superior court of criminal jurisdiction under the *Criminal Code* and under this Act."

No jury

(2) The trial of an offence under Part V or section 46.1 in the Federal Court—Trial Division shall be without a jury.

Appeal

(3) An appeal lies from the Federal Court—Trial Division to the Federal Court of Appeal and from the Federal Court of Appeal to the Supreme Court of Canada in any prosecution or proceedings under Part V or section 46.1 of this Act as provided in Part XVIII of the *Criminal Code* for appeals from a trial court and from a court of appeal.

Proceedings optional

(4) Proceedings under subsection 30(2) may in the discretion of the Attorney General be instituted in either the Federal Court—Trial Division or a superior court of criminal jurisdiction in the province but no prosecution shall be instituted in the Federal Court—Trial Division in respect of an offence under Part V or section 46.1 without the consent of the individual. R.S., c. C-23, s. 46; R.S., c. 10(2nd Supp.), s. 65; 1974-75-76, c. 76, s. 23.

"(4) Proceedings under subsection 30(3) may in the discretion of the Attorney General be instituted in either the Federal Court—Trial Division or a superior court of criminal jurisdiction in the province but no prosecution shall be instituted against a natural person in the Federal Court—Trial Division in respect of an offence under Part V or section 46.1 without the consent of that person."

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46.1 Any person who contravenes or fails to comply with an order of the Commission is guilty of an offence and is liable

"**46.1** (1) Any person who contravenes or fails to comply with an order of the Board for the failure to comply with which or the contravention of which no other punishment is provided by any other provision of this Act is guilty of an offence and is liable"

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. 1974-75-76, c. 76, s. 24.

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"(2) Any person who contravenes or fails to comply with an injunction issued under section 29 or 29.1, an order made under section 30 or a requirement of a court made under section 31 is guilty of an indictable offence and liable to imprisonment for two years."

PART VII

Investigation of Monopolistic Situations

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47. (1) The Director

(*a*) upon his own initiative may, and upon direction from the Minister or at the instance of the Commission shall, carry out an inquiry concerning the existence and effect of conditions or practices relating to any product that may be the subject of trade or commerce and which conditions or practices are related to monopolistic situations or restraint of trade, and

(*b*) upon direction from the Minister shall carry out a general inquiry into any matter that the Minister certifies in the direction to be related to the policy and objectives of this Act,

and for the purposes of this Act, any such inquiry shall be deemed to be an inquiry under section 8.

"**47.** (1) The Competition Policy Advocate, on his own initiative may, and on direction from the Minister shall, carry out an inquiry concerning the existence and effect of conditions or practices relating to any product, which conditions or practices are related to monopolistic situations, restraint of trade, regulated conduct or any other matter that is relevant to the policy and objectives of this Act, and for the purposes of this Act, any such inquiry shall be deemed to be an inquiry under section 8.

Use of evidence and information otherwise obtained

(2) It is the duty of the Commission to consider any evidence or material brought before it under subsection (1) together with such further evidence or material as the Commission considers advisable and to report thereon in writing to the Minister, and for the purposes of this Act any such report shall be deemed to be a report under section 19. R.S., c. C-23, s. 47; 1974-75-76, c. 76, s. 25.

(2) The Competition Policy Advocate may, for the purposes of an inquiry under subsection (1), use any evidence or information that he has obtained or obtains in the course of any other inquiry under section 8.

Report to Minister

(3) The Competition Policy Advocate shall, on completion of an inquiry under subsection (1), prepare a report of the inquiry and submit it to the Minister.

Copy of report and notice of right to request reopening

(4) Forthwith after submitting a report to the Minister pursuant to subsection (3), the Competition Policy Advocate shall send a copy thereof to every person in respect of whom a power conferred on the Competition Policy Advocate by this Act for the purpose of obtaining evidence has been exercised in the course of the inquiry together with a notice advising each such person that he may, within sixty days after the day on which the notice is sent by the Competition Policy Advocate, apply to the Minister to appoint a commissioner to reopen the inquiry and, on completion of the reopened inquiry, to make a further report to the Minister.

Appointment of commissioner and powers

(5) On receipt of a report pursuant to subsection (3), the Minister may, in his discretion and whether or not he receives an application pursuant to subsection (4), appoint a commissioner to reopen the inquiry to which the report relates and any person so appointed has, in relation to the subject-matter of the inquiry, all the powers of a commissioner appointed under Part I of the *Inquiries Act*.

Duties of commissioner

(6) A commissioner appointed under subsection (5) shall consider the report of the Competition Policy Advocate in relation to the inquiry in respect of which the commissioner was appointed, afford to every person who made an application to the Minister pursuant to subsection (4) in relation to that inquiry and the Competition Policy Advocate a reasonable oppor-

tunity to be heard and take any further steps and make any further investigation that he considers necessary or desirable to supplement or complete the inquiry.

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(7) On the completion of a reopened inquiry, the commissioner appointed in relation thereto shall prepare and submit a report thereon to the Minister and the Minister shall, within ninety days of receipt by him of such a report, cause it to be published in such manner as he deems appropriate.

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(8) The Minister shall, within one hundred and twenty days of receipt of of a report from the Competition Policy Advocate pursuant to subsection (3), if before that time the inquiry to which the report relates is not reopened in accordance with this section, cause the report to be published in such manner as he deems appropriate.

iscontinuance inquiry

(9) The Competition Policy Advocate may, at any time, discontinue an inquiry commenced under subsection (1) when in his opinion no useful purpose will be served by continuing the inquiry and making a report under subsection (3) to the Minister thereon.

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(10) On written request of any person in respect of whom a power conferred on the Competition Policy Advocate by this Act for the purpose of obtaining evidence has been exercised in the course of an inquiry commenced under subsection (1) or on his own motion, the Minister may review a decision of the Competition Policy Advocate to discontinue such inquiry and may, if in his opinion the circumstances warrant, instruct the Competition Policy Advocate to make a further inquiry.

International Agreements

nternational agreements

47.1 (1) The Minister may, with the approval of the Governor in Council, enter into agreements with the governments of other countries providing for the elimination of private restrictions on international trade, assistance in the administration and

enforcement of laws relating to the safeguarding of competition or the exchange of information relevant to the administration and enforcement of such laws, and the Competition Policy Advocate may supply and receive information in accordance with any such agreement notwithstanding any other provision of this Act.

Provision regarding confidentiality

(2) To the greatest extent possible, the Minister shall ensure that each agreement entered into under this section that provides for the exchange of information affords to information supplied by the Competition Policy Advocate pursuant thereto the same protection against disclosure or use for purposes other than in relation to the administration and enforcement of laws relating to the safeguarding of competition as is afforded by this or any other Act of Parliament."

Regulations and Report to Parliament

Regulations

48. The Governor in Council may make such regulations, not inconsistent with this Act, as to him seem necessary for carrying out this Act and for the efficient administration thereof. R.S., c. 314, s. 43.

Annual report

49. The Director shall report annually to the Minister the proceedings under this Act, and the Minister shall within thirty days after he receives it lay the report before Parliament, or, if Parliament is not then in session, within the first fifteen days after the commencement of the next ensuing session. R.S., c. 314, s. 44.

"**49.** The Competition Policy Advocate shall report annually to the Minister the proceedings under this Act, and the Minister shall cause such report to be laid before Parliament within thirty days after the receipt thereof by him or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

Construction of Provisions

Authority of Board

50. Nothing in this Act shall be construed as authorizing the Board to make an order in respect of any matter that is not within the legislative authority of Parliament."

RELATED AND CONSEQUENTIAL AMENDMENTS

ferences to e Director"

(1) The following provisions of the *Combines Investigation Act*, namely, subsections 6(2), (3), (4) and (5) and 7(1), section 8, subsections 9(1) and (2), 10(3), 11(2) and 12(1), paragraphs 12(2)(*b*) and (*c*), subsections 14(2), (3) and (4), 15(1) and 17(5), sections 25 and 26, subsection 31.2(1), section 31.3, subsections 31.4(2) and (3), section 31.5, subsections 31.6(1) and (2), section 31.7, subsection 31.8(3), section 31.9, subsections 32.1(2) and 45.1(2) and section 45.2 are amended by substituting for the words "the Director", wherever they appear in those provisions, the words "the Competition Policy Advocate".

eferences to he Commis- on"

(2) The following provisions of the said Act, namely, paragraph 7(1)(*b*), subparagraph 8(*b*)(ii), subsections 9(2), 10(3) and 12(1), paragraphs 12(2)(*a*) and (*d*), subsection 17(8), section 21, paragraph 31.1(4)(*b*), the heading immediately preceding section 31.2, subsection 31.2(1), section 31.3, subsections 31.4(2), (3) and (4), section 31.5, subsection 31.6(1), section 31.7, subsections 31.8 (2) and (3), section 31.9, subsections 45(2) and 45.1(1), (2) and (4), section 45.2, and subsection 45.3(1) are amended by substituting for the words "the Commission" wherever they appear in those provisions, the words "the Board".

References to 'Deputy Director", etc.

(3) The following provisions of the said Act, namely, subsections 6(1) to (5) and paragraph 12(2)(*c*) are amended by substituting for the words "Deputy Directors of Investigation and Research", "Deputy Director" and "Deputy Directors", wherever they appear in those provisions, the words "Deputy Competition Policy Advocates" or "Deputy Competition Policy Advocate", as appropriate.

References to "company" and "companies"

(4) The following provisions of the said Act, namely, paragraph (*b*) of the definition "article" in section 2, subsections 31.4(4), (5) and (6), section 31.5, subsections 31.6(1) and (2), 32(7), 32.1(2), 32.2(3) and 38(2), (7) and (7.1) and section 44.1 are amended by substituting for the words "company" and

"companies", wherever they appear in those provisions, the words "corporation" and "corporations", respectively.

Offence provisions

(5) The provisions of the said Act referred to in the Schedule are amended in the manner and to the extent indicated in the Schedule.

SCHEDULE
(Subsection 39(5))

Subsection 32.2(2) of the *Combines Investigation Act* is repealed and the following substituted:

"(2) Every one who is a party to bid-rigging is guilty of an indictable offence and is liable to a fine in the discretion of the court or to imprisonment for five years or to both."

All that portion of subsection 32.3(1) of the said Act following paragraph (*b*) thereof is repealed and the following substituted:

"is guilty of an indictable offence and is liable to a fine in the discretion of the court or to imprisonment for five years or to both."

Subsection 36.2(2) of the said Act is repealed and the following substituted:

"(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine of ten thousand dollars or to imprisonment for one year or to both."

Subsection 37(4) of the said Act is repealed and the following substituted:

"(4) Any person who violates subsection (2) is guilty of an offence and is liable on summary conviction to a fine of twenty-five thousand dollars or to imprisonment for one year or to both."

Subsection 37.1(2) of the said Act is repealed and the following substituted:

"(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine of twenty-five thousand dollars or to imprisonment for one year or to both."

Subsection 38(8) of the said Act is repealed and the following substituted:

"(8) Every person who violates subsection (1) or (6) is guilty of an indictable offence and is liable to a fine in the discretion of the court or to imprisonment for five years or to both."

SCHEDULE—*Conclusion*

Subsection 41(2) of the said Act is repealed and the following substituted:

"(2) Every person who violates subsection (1) is guilty of an offence and is liable on summary conviction or on conviction on indictment to a fine of five thousand dollars or to imprisonment for two years or to both."

Subsections 42(1) and (2) of the said Act are repealed and the following substituted:

"**42.** (1) Every person who violates subsection 10(2) is guilty of an offence and is liable on summary conviction or on conviction on indictment to a fine of five thousand dollars or to imprisonment for two years or to both.

(2) Every person who, without good and sufficient cause, the proof whereof lies on him, refuses, neglects or fails to comply with a notice in writing requiring a written return under oath or affirmation pursuant to section 9 is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine of five thousand dollars or to imprisonment for two years or to both."

Section 43 of the said Act is repealed and the following substituted:

"**43.** Every person who, without good and sufficient cause, the proof whereof lies on him, refuses, neglects or fails to comply with a notice in writing requiring evidence upon affidavit or written affirmation, pursuant to subsection 12(1) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine of five thousand dollars or to imprisonment for two years or to both."

OTHER ACTS AMENDED

BANK ACT

"**102.1** The provisions of this Act relating to

(*a*) agreements between or among banks, and

(*b*) mergers

apply to banks in lieu of sections 32 and 33 of the *Combines Investigation Act* and of other provisions of that Act relating to the matters referred to in paragraphs (*a*) and (*b*)."

(repealed)

Prohibited Agreements

138. (1) Except as provided in subsection (2), every bank that makes an agreement with another bank with respect to

(*a*) the rate of interest on a deposit, or

(*b*) the rate of interest or the charges on a loan,

and every director, officer or employee of the bank who knowingly makes such an agreement on behalf of the bank, is liable to a penalty of ten thousand dollars.

(repealed)

(2) Subsection (1) does not apply to an agreement

(*a*) with respect to a deposit or loan made or payable outside Canada;

(*b*) applicable only to the dealings of two or more banks as regards a customer of such banks;

(*c*) with respect to a bid for or purchase, sale or underwriting of securities by banks or a group including banks; or

(*d*) requested or approved by the Minister. 1966-67, c. 87, s. 138.

Reduction or remission of duties for purposes of *Competition Act*

16. (1) Whenever the Governor in Council deems it to be in the public interest to inquire into any conspiracy, combination, agreement or arrangement alleged to exist among manufacturers or dealers in any article of commerce to unduly promote the advantage of the manufacturers or dealers in such article at the expense of the consumers, the Governor in Council may commission or empower any judge of the Supreme Court, or of the Exchequer Court of Canada, or of any superior court or county court in Canada, to hold an inquiry in a summary way and report to the Governor in Council whether such conspiracy, combination, agreement or arrangement exists.

Restoration of duties

(2) The judge may compel the attendance of witnesses and examine them under oath and require the production of books and papers, and shall have such other necessary powers as are conferred upon him by the Governor in Council for the purpose of such inquiry.

(3) If the judge reports that such conspiracy, combination, agreement or arrangement exists in respect of such article, the Governor in Council may admit the article free of duty, or so reduce the duty thereon as to give to the public the benefit of reasonable competition in the article, if it appears to the Governor in Council that such disadvantage to the consumer is facilitated by the duties of customs imposed on a like article. R.S., c. 60, s. 14.

"**16.** (1) On the recommendation of the Minister of Finance, the Governor in Council may, where in his opinion it would be relevant for the purposes of an order made by the Competition Board established by the *Competition Act* pursuant to section 31.71 or 31.76 of that Act to do so, by order, reduce or remove any duties of customs set out in Schedule A on an article or articles specified in the order.

(2) On the recommendation of the Minister of Finance, the Governor in Council may, where in his opinion a reduction, or removal of duties of customs made pursuant to subsection (1) is no longer relevant for the purposes of the order referred to in that subsection in relation to which it was made, restore such rate of duties to the rate in effect immediately before it was so reduced or removed."

NATIONAL TRANSPORTATION ACT

ublication

(2) The Commission shall give or cause to be given such public or other notice of any proposed acquisition referred to in subsection (1) as to it appears to be reasonable in the circumstances, including notice to the Director of Investigation and Research under the *Combines Investigation Act*.

"(2) The Commission shall give or cause to be given such public or other notice of any proposed acquisition referred to in subsection (1) as to the Commission appears to be reasonable in the circumstances, including notice to the Competition Policy Advocate appointed under the *Competition Act*."

SHIPPING CONFERENCES EXEMPTION ACT

Inquiry by Competition Policy Advocate

11. (1) The Director upon his own initiative may, and upon direction from the Minister of Consumer and Corporate Affairs or at the request of the Restrictive Trade Practices Commission shall, carry out an inquiry concerning the operations of any shipping conference and the effect that practices of the conference have in limiting facilities for the transportation of any goods, preventing or lessening competition in the transportation of any goods or restraining or injuring trade or commerce in relation to any goods.

"**11.** (1) The Competition Policy Advocate on his own initiative may, and on direction from the Minister of Consumer and Corporate Affairs shall, carry out an inquiry concerning the operations of any shipping conference and the effect that practices of the conference have in limiting facilities for the transportation of any goods, preventing or lessening competition in the transportation of any goods or restraining or injuring trade or commerce in relation to any goods.

Deemed inquiry under *Competition Act*

(2) Any inquiry carried out by the Director pursuant to subsection (1) shall be deemed to be an inquiry under section 8 of the *Combines Investigation Act* and the Restrictive Trade Practices Commission shall consider any evidence or material brought before it by the Director, together with such further evidence and material as it considers advisable, and report thereon to the Minister of Consumer and Corporate Affairs.

(2) Any inquiry carried out by the Competition Policy Advocate pursuant to subsection (1) shall be deemed to be an inquiry under section 47 of the *Competition Act*."